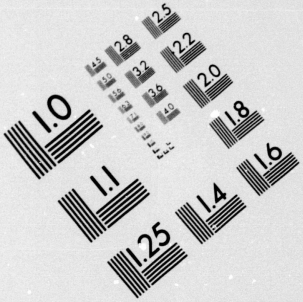

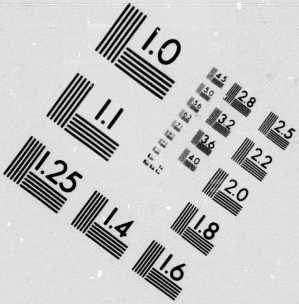

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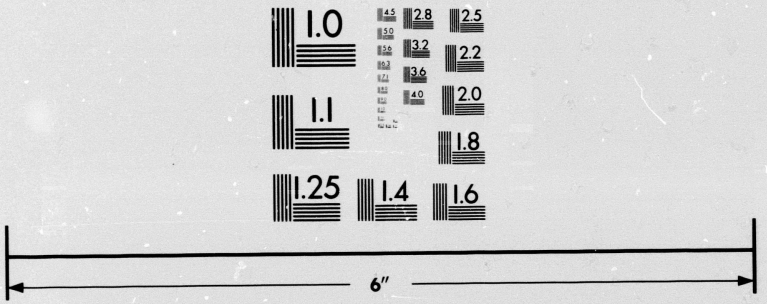

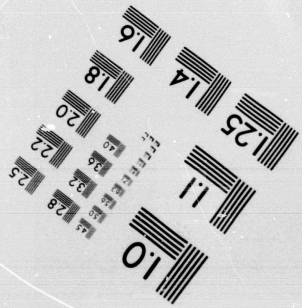

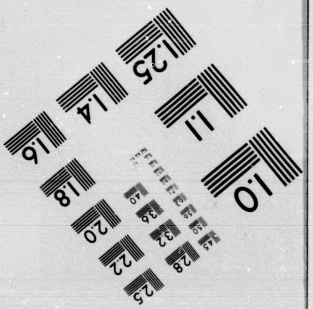

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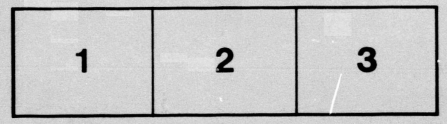

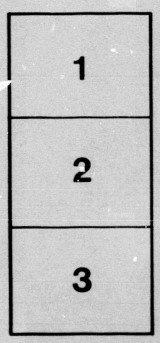

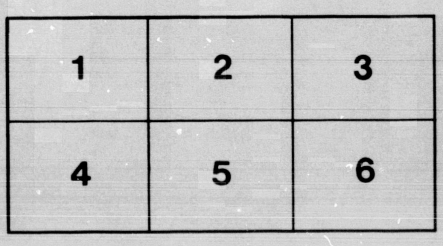

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VOLUME
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A DIGEST OF CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL FROM

DOMINION, PROVINCIAL AND TERRITORIAL COURTS
OF CANADA DURING THE YEARS 1893-1898,

COMPRISING ALL

CASES REPORTED IN VOLUMES 22 TO 28, BOTH INCLUSIVE, AND PART OF VOLUME 29 OF THE OFFICIAL REPORTS OF THE COURT, AND A NUMBER OF UNREPORTED CASES DECIDED DURING THE SAME PERIOD.

COMPILED BY

LOUIS WILLIAM COUTLÉE,

Advocate and Barrister-at-Law,
One of the Official Law Reporters of the Court.

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PREFACE.

THIS DIGEST covers the period embraced by volumes 22 to 28 inclusively of the official reports of the Supreme Court of Canada, and a number of unreported cases decided during that time by the court as well as a few unreported cases decided previously but hitherto unnoted so far as could be ascertained by the compiler. This work is a continuation of the late Mr. Cassels's Digest down to the end of the year 1898. A few interesting cases decided during the beginning of 1899 have been added while the book was in press. The same general plan has been followed as that adopted in Cassels's Digest. of the first twenty-one volumes of the reports of the court, the cases have been placed in chronological order, broken up as little as possible, and copious cross-references have been made in addition to full digests under the heads of subjects principally affected by the decisions reported. At the end of the work appendices have been inserted shewing respectively the disposition made of cases which it has not been thought necessary to digest in full under any particular classification, the results of appeals or applications for leave to appeal from decisions of the Supreme Court of Canada to Her Majesty's Privy Council during the period of the Digest and a list of cases specially noticed in the cases which have been digested. The index is a complete list of all cases decided by the court from the date of Cassels's Digest to the end of the year 1898.

Errors in references, should any such have occurred, may be corrected by referring to the index.

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CHIEF JUSTICES, JUDGES AND OFFICERS

OF THE

SUPREME COURT OF CANADA SINCE ITS ORGANIZATION.

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CHIEF JUSTICES.

Hon. Sir William Buell Richards, Knight,
Appointed 8th October, 1875,
Resigned 10th January, 1879.

Hon. Sir William Johnstone Ritchie, Knight,
Appointed 11th January, 1879,
Died 12th September, 1892.

Right Hon. Sir Samuel Henry Strong, Knight,
Appointed 13th December, 1892.

JUDGES.

Hon. Sir William Johnstone Ritchie, Knight,
Appointed 8th October, 1875.

Right Hon. Sir Samuel Henry Strong, Knight,
Appointed 8th October, 1875.

Hon. Jean Thomas Taschereau,
Appointed 8th October, 1875,
Resigned 6th October, 1878.

Hon. Telesphore Fournier,
Appointed 8th October, 1875,
Resigned 12th September, 1895.

Hon. William Alexander Henry,
Appointed 8th October, 1875,
Died 5th May, 1888.

Hon. Henri Elzear Taschereau.
Appointed 7th October, 1878.

Hon. John Wellington Gwynne,
Appointed 14th January, 1879.

Hon. Christopher Salmon Patterson,
Appointed 27th October, 1888,
Died 24th May, 1893.

Hon. Robert Sedgewick,
Appointed 18th February, 1893.

Hon. George Edwin King,
Appointed 21st September, 1893.

Hon. Desiré Girouard,
Appointed 28th September, 1895.

OFFICERS OF THE COURT.

REGISTRARS.

Robert Cassels, Q.C.
Appointed 8th October, 1875,
Died 17th June, 1898.

Edward Robert Cameron,
Appointed 2nd July, 1898.

LAW REPORTERS.

George Duval, Q.C.,
Appointed 20th January, 1876,
Died 6th June, 1895.

Archibald Sandwith Campbell,
Appointed Assistant Reporter, 3rd March, 1886,
Died 3rd September, 1886.

Charles Harding Masters,
Appointed Assistant Reporter, 1st October, 1886,
Appointed Chief Reporter, 2nd October, 1895.

Louis William Coutlée,
Appointed Assistant Reporter, 2nd December, 1895.

ABBREVIATIONS.

A.C. or App. Cas. ..... Law Reports, House of Lords and Privy Council Appeal Cases.
Art. ..... Article.

B.C. ..... British Columbia.
B.N.A. ..... British North America.

c., ch., or cap. ..... Chapter.
C.C. ..... Civil Code of Lower Canada.
C.C.P. ..... Code of Civil Procedure, Lower Canada (1867).
C.J. ..... Chief Justice.
C.P.Q. ..... Code of Civil Procedure, Province of Quebec (1897).
C.P.R. ..... Canadian Pacific Railway.
C.S.C. ..... Consolidated Statutes of Canada.
C.S.L.C. ..... Consolidated Statutes, Lower Canada.
C.S.M. ..... Consolidated Statutes of Manitoba.
C.S.U.C. ..... Consolidated Statutes, Upper Canada.
Can. or (C.) ..... Canada (1840-1867).
Can.S.C.R. ..... Canada Supreme Court Reports.
Cass. Dig. ..... Cassels's Digest, Supreme Court Cases (1893).
Cass. Sup. Ct. Prac. ..... Cassels's Supreme Court Practice, 2nd edition, by Masters.
Ch. or Ch. App. ..... Law Reports, Chancery Appeals.
Ch. D. ..... Law Reports, Chancery Division.

(D.) ..... Dominion of Canada.
DeG. M. & G. ..... DeGex, McNaughton & Gordon's Reports.
Div. Ct. ..... Divisional Court.
Dor. Q.B. ..... Dorion, Queen's Bench Reports (Quebec).

ed. ..... Edition.
Ed. & Ord. ..... Edits & Ordonnances (Lower Canada).
Ex.C.R. ..... Reports of the Exchequer Court of Canada.

F. & F. ..... Foster & Finlayson's Reports.

Gr. ..... Grant's Chancery Reports.
G.T.R. ..... Grand Trunk Railway of Canada.

H.L. ..... House of Lords.

Imp. ..... Imperial.

J. ..... Justice.
J.J. ..... Justices.

L.C. Jur.....Lower Canada Jurist.
L.C.R.....Lower Canada Reports.
L.R.....Law Reports (English).

Man.....Manitoba.
Man. L.R. .....Manitoba Law Reports.
Mer.....Merivale's Reports, Chancery.
M.L.R.....Montreal Law Reports (Queen's Bench and Superior Court).
Mun. Code Que.....Municipal Code, Quebec.

N.B.....New Brunswick.
N.B.Rep.. .....New Brunswick Reports.
N.W.....North-west.
N.W.T. or N.W.Ter. ....North-west Territories of Canada.
N.W.T. Rep .....North-west Territories Reports (Canada).
N.S.....Nova Scotia.
N.S. Rep. ....Nova Scotia Reports.

O. or Ont. .....Ontario.
Ont. App. R.....Ontario Appeal Reports.
Ont. P R.....Ontario Practice Reports.
O.R.....Ontario Reports (Queen's Bench, Chancery and Common Pleas Divisions of the High Court of Justice for Ontario).

P.D.....Probate, Divorce and Admiralty Division.
P.E.I. .....Prince Edward Island.

Q., or Que.....Quebec.
Q.B.....Queen's Bench.
Q.L.R.....Quebec Law Reports.
Q.R.....Official Reports, Province of Quebec.

Rep.....Reports (or Coke's Reports according to text).
R.L.....Revue Legale.
Rev.de Jur.....Revue de Jurisprudence (Quebec).
Rev. de Leg.....Revue de Legislation (Quebec).
Rev. Ord. N.W.T.....Revised Ordinances, North-West Territories (1888).
R.S.B.C.. .....Revised Statutes of British Columbia.
R.S.C.....Revised Statutes of Canada.
R.S.M.....Revised Statutes of Manitoba.
R.S.N.B.....Revised Statutes of New Brunswick.
R.S.N.S.....Revised Statutes of Nova Scotia.
R.S.O.....Revised Statutes of Ontario.
R.S.Q.....Revised Statutes of Quebec.

s. and ss.....Section, sections.
s.s.... .....Sub-section.
S.C. .....Superior Court.
ser. .....Series.
Sim.....Simons's Reports, Chancery.

U.C.C.P.....Upper Canada, Common Pleas Reports.
U.C.Q.B.. .....Upper Canada, Queen's Bench Reports.

ADDITIONS AND CORRECTIONS

TO BE MADE BEFORE USING THIS DIGEST.

Add under "ACCOUNT," as No. 6, on page 2:—

6.—STATED AND SETTLED ACCOUNT—ESTOPPEL—MANAGING PARTNER.
See PARTNERSHIP, 8*a*.

Add under "CONTRACT," as No. 74, on page 73:—

74.—RESCISSION—INNOCENT MISREPRESENTATION—COMMON ERROR—SALE OF LAND—FAILURE OF CONSIDERATION.
See VENDOR AND PURCHASER, 11*a*.

Add under "CROWN," as No. 23, on page 79:—

23.—INTEREST AGAINST CROWN—CONSENT TO REVERSAL ON APPEAL.
See INTEREST, 1*a*.

Add under "ESTOPPEL," as No. 18, page 98:—

18.—ACCOUNTS STATED AND SETTLED—MANAGING PARTNER.
See PARTNERSHIP, 8*a*.

Add under "PRACTICE," as No. 64, on page 205:—

64.—CONSENT TO REVERSAL ON APPEAL—SUPREME COURT ACT—R. S. C. c. 135, s. 52—INTEREST AGAINST THE CROWN.
See INTEREST, 1*a*,

Page 9—Line 2 from bottom of first column, *delete* the letter "E."

Page 12—The reference to *Mylius* v. *Jackson*, should be "xxiii, 485."

Page 21—At line 17 of first column, for "*Seid Sino Kaw*," read "*Seid Sing Kaw*."

Page 24—At line 7 from bottom of second column, for "34," read "36."

Page 129—Note reference to slip reporting *Toronto Railway Co.* v. *The Queen*, under "*Interest*," as No. 1*a*.

ANALYTICAL DIGEST OF CASES

IN THE

SUPREME COURT OF CANADA.

DECIDED DURING THE YEARS 1893 TO 1898.

ABANDONMENT.

1.—Partnership—Judicial Abandonment—Dissolution — Composition — Subrogation—Confusion of Rights—Compensation—Arts. 772 and 778 C. C. P.

A partner in a commercial firm which made a judicial abandonment was indebted to the firm at the time of the abandonment in a large amount overdrawn upon his personal account. Subsequently he made and carried out a composition with the creditors of the firm, and with the approval of the Court, the curator transferred to him, by an assignment in authentic form, "all the assets and estate generally of the said late firm," * * * "as they existed at the time the said curator was appointed." At the same time the creditors discharged both him and his partners from all liability in respect of the partnership.

Held, affirming the decision of the Court below, that the effect of the judicial abandonment was to transfer to the curator not only the partnership estate, but also the separate estates of each partner as well as the partners' individual rights as between themselves.

Held, reversing the decision of the Court below, Strong, C.J., and Taschereau, J., dissenting that the assignment of the estate by the curator and the discharge by the creditors, taken together, had the effect of releasing all the partners from the firm debts, but vested all the rights which had been transferred by the abandonment in the transferee personally and could not revive the individual rights of the partners as between themselves, and that in consequence any debt owing by the transferee to the partnership at the time of the abandonment became extinguished by confusion.

McLean v. *Stewart* .. .. .. xxv., 225

2.—Notice of Abandonment—Marine Insurance — Constructive Total Loss—Sale of Vessel by Master—Necessity for Sale.

See Insurance Marine, 5.

ABATEMENT OF APPEAL.

Election Petition—Dissolution of Parliament—Abatement of Proceedings—Return of Deposits—Payment out of Court Below—Practice.

See Election Law, 1.

ACCESSORY.

Fraudulent Appropriation — Unlawful Receiving—Simultaneous Acts.

A fraudulent appropriation by a principal and a fraudulent receiving by an accessory may take place at the same time and by the same act.

McIntosh v. *The Queen* .. .. .. xxiii., 180

See Criminal Law, 2.

ACCOUNT.

1.—Will—Legacy—Bequest of—Partnership Business—Acceptance by Legatee—Right of Legatee to an Account.

See Partnership, 7.

2.—Partnership—Division of Assets—Art. 1898 C. C.—Mandate—Debtor and Creditor.

See Partnership, 8.

3.—Debtor and Creditor—Security for Debt—Security realized by Creditor—Appropriation of Proceeds—Res judicata.

See Banking, 4.

4.—Trust Funds—Abandonment by cestui que trust—Evidence.

See Trusts, 7.

5.—Municipal Corporation—Railway Aid Debentures—Sale of Shares at Discount—Trustee—Debtor and Creditor—Division of County—Erection of New Municipalities—Assessment—Action en Reddition de Comptes—Arts. 78, 164, 939, Mun. Code, Que.—24 V. c. 30 (Que.)—29 V. c. 50 (Que.).

See Action, 19.

ACCRETION TO LANDS.

Description of Lands—Falsa Demonstratio—Water Lots—After acquired Title—Contribution to Redeem.

See Mortgage, 4.

ACQUIESCENCE.

Trustees—Misappropriation—Surety—Knowledge by cestui que trust—Estoppel—Parties.

See Evidence, 31.

ACTION.

Compensation—Defence—Taking Advantage of one's own wrong.

In an action to recover an amount received by the defendant for the plaintiff, the defendant pleaded *inter alia* that the action was premature inasmuch as he had got the money irregularly from the Treasurer of the Province of Quebec on a report of distribution of the prothonotary before all the contestations to the report of collocation had been decided.

Held, affirming the judgment of the Court below, that this defence was not open to the defendant, as it would be giving him the benefit of his own improper and illegal proceedings.

Bury v. *Murray* .. .. xxiv., 77

2.—Warranty—Proceedings taken by Warrantee before Judgment on Principal Demand.

It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdiction arises and he suffers no prejudice thereby.

But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned he does so at his own risk, and if an unfounded action has been taken against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences.

Archbald v. *deLisle.*
Baker v. *deLisle.*
Mowat v. *deLisle* .. ..xxv., 1

3.—Negligence—Risk Voluntarily Incurred—"Volenti non fit injuria."

On the trial of an action for damages in consequence of an employee of a lumber company being killed in a loaded car which was being shunted, the jury had found that "the deceased voluntarily accepted the risks of shunting," and that the death of the deceased was caused by defendant's negligence in shunting, in giving the car too strong a push.

Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skillful manner, and that the maxim "*volenti non fit injuria*" had no application. *Smith* v. *Baker* ([1891] A.C. 325) applied.

The Canada Atlantic Ry. Co. v. *Hurdman* .. .. xxv., 205

4.—Revendication—Replevin—Criminal Code, Sec. 575—Confiscation of Gaming Instruments, Moneys, etc.

Moneys were seized in a gaming-house, under a warrant issued under sec. 575 of the Criminal Code, and confiscated by the judgment of a Police Magistrate sitting in the City of Montreal. In an action against the Attorney-General to recover the moneys so seized:

Held, *per* Strong, C.J., that a judgment declaring the forfeiture of money so seized cannot be collaterally impeached in an action of revendication.

O'Neil v. *The Attorney-General of Canada* .. .. xxvi., 122

5.—Bailees—Common Carriers — Express Company—Receipt for Money Parcel — Conditions Precedent — Formal Notice of Claim — Pleading — Money had and Received — Special Pleas — "Never Indebted."

Where an express company gave a receipt for money to be forwarded with the condition indorsed that the company should not be liable for any claim in respect of the package useless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed:

Held, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver tne parcel to the consignee. *Richardson* v. *The Canada West Farmers' Ins. Co.* (16 U. C. C. P. 430) distinguished.

In an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted" put in issue all material facts necessary to establish the plaintiff's right of action.

The Northern Pacific Express Co. v. *Martin, et al* .. .. xxvi., 135

6.—Contract — Public Works — Progress Estimates — Engineer's Certificate—Revision by Succeeding Engineer—Action for Payment on Monthly Certificate.

A contract with the Crown for building locks and other work on a government canal provided for monthly payments to the contractors of 90 per cent. of the value of the work done at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer, approved by the Minister of Railways and Canals, that the work certified for had been executed to his satisfaction; the certificate so approved was to be a condition precedent to the right of the contractors to the monthly payments, and the remaining 10 per cent. of the whole of the work was to be retained until its final completion; the engineer was to be the sole judge of the work and materials, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final; and he was to be at liberty to make any changes or alterations in the work which he should deem expedient.

Held, that though the value of the work certified to by the monthly certificates was only approximate and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed had classified it and fixed the value, his decision was final and could not be reopened and revised by a succeeding engineer.

Held also, that the contractors could proceed by action if payment on a monthly certificate was withheld, and were not obliged to await the final completion of the work before suing.

Murray v. *The Queen* .. .. .. xxvi., 203

7.—Chattel Mortgage — Mortgagee in Possession—Negligence—Sale under Powers — Practice — Assignment for Benefit of Creditors — Revocation of.

Under the provisions of R. S. O. c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his original right of action.

Where creditors refused to accept the benefit of an assignment under R. S. O. c. 124, and the assignor was notified of such refusal, and that the assignment had not been registered an action for damages was properly brought in the name of the assignor against a mortgagee of his stock in trade, who sold the goods in an improper manner.

Rennie v. *Block et al* .. .. ..xxvi., 356

8. — Jurisdiction — Mortgage of Foreign Lands—Action to set Aside—Secret Trust—Lex rei Sitæ.

A Canadian Court cannot entertain an action to set aside a mortgage on foreign lands on the ground that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title, it not being alleged in the action, and the Court not being able to assume, that the law of the foreign country in which the lands were situate corresponded to the statutory law of the province in which the action was brought. *Burns* v. *Davidson* (21 O. R. 547) approved and followed.

Purdom v. *Pavey & Co.* .. .. .. xxvi., 412

9.— Trust — Principal and Agent — Advances to Agent to buy Goods—Trust Goods mixed with those of Agent—Replevin—Equitable Title.

If an agent is entrusted by his principal with money to buy goods, the money will be considered trust funds in his hands, and the principal has the same interest in the goods when bought as he had in the funds producing them.

If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase, as well as to the unexpended balance.

Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin.

Carter v. *Long & Bisby* .. .. .. xxvi., 430

10.—Partnership—Division of Assets—Art. 1898 C. C.—Mandate—Debtor and Creditor—Account.

Upon the dissolution of a partnership, where one of the partners has been entrusted with the collection of moneys due as the mandatary of the others, any of his co-partners may bring suit against him directly either for an account under the mandate, or for money had and received.

Lefebvre v. *Aubry* .. .. xxvi., 602

11.—Warranty — Suretyship — Recourse of Sureties inter se — Ratable Contribution — Banking — Discharge of Co-surety—Reserve of Recourse—Trust Funds in Possession of a Surety—Arts. 1156, 1959 C. C.

Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.

Where a creditor has released one of several sureties with a reservation of his recourse against the others, and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourses reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties.

Macdonald v. *Whitfield.*

Whitfield v. *The Merchants Bank of Canada* .. .. xxvii., 94

12.—Administration — Trustees—Agents —Nullity—Art. 1484 C. C.

In an action where no special demand to that effect has been made, the Court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of article 1484 of the Civil Code.

Guertin v. *Sansterre* .. .. .. xxvii., 522

13. — Suretyship — Promissory Note — Qualified Indorsement.

D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment, and, A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R., and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm.

Held, that the action was not based upon the real contract between the parties, and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes.

Held further, per Sedgewick, J., that neither the payee of the promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself.

Robertson v. *Davis* .. .. .. xxvii., 571

14.—Action on Disturbance—Possessory Action—"Possession annale"—Arts. 946 and 948 C. C. P.—Nature of Possession of Unenclosed Vacant Lands — Boundary Marks — Delivery of Possession.

In 1890, G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him, on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person who commenced laying foundations for a building, and, in doing so encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance.

Held, that the *possession annale*, required by article 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action.

Gauthier v. *Masson* .. .. .. xxvii., 575

15. — Service — Judgment by Default — Opposition to Judgment—Reasons of —"Recissoire" joined with "Rescindant"—Arts. 16, 89 *et seq.*, 483, 489, C. C. P.—False Return of Service.

No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.

The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment, and have it set aside notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.

An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescissoire* has thus been improperly joined with the *rescindant*.

Turcotte v. *Dansereau* .. .. .. xxvii., 583

16.—Right of Action—Conveyance Subject to Mortgage—Obligation to Indemnify — Assignment of — Principal and Surety—Implied Contract.

The obligation of a purchaser of mortgaged lands to indemnify his grantor against the personal covenant for payment may be assigned even before the institution of an action for the recovery of the mortgage debt and, if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same.

Maloney v. *Campbell* .. .. .. xxviii., 228

17.—Cause of Action—Trade Union—Combination in Restraint of Trade—Strikes—Social Pressure.

Workmen who, in carrying out the regulations of a Trade Union forbidding them to work at a trade in company with non-union workmen, without threats, violence, intimidation or other illegal means, take such measures as result in preventing a non-union workman from obtaining employment at his trade in establishments where union workmen are engaged, do not thereby incur liability to an action for damages. Judgment of the Court of Queen's Bench (Q. R. 6 Q. B. 65) affirmed.

Perrault v. *Gauthier et al* .. .. xxviii., 241

18.—Condictio Indebiti—Title to Land—Exposure to Eviction — Sheriff — Vacating Sale—Refund of Price of Adjudication—Substitution not yet Open—Prior Incumbrancer—Petition —Arts. 706, 710, 714, 715, C. C. P.

The provisions of article 715 of the Code of Civil Procedure of Lower Canada do not apply to sheriff's sales which have been perfected by payment of the price of adjudication and the execution of a deed, nor does that article give a right to have such a sale vacated, and the amount paid refunded.

The *actio condictio indebiti* for the recovery of the price paid by the purchaser of lands lies only in cases where there has been actual eviction. Mere exposure to eviction is not sufficient ground for vacating a sheriff's sale.

The procedure by petition provided by the Code of Civil Procedure for vacating sheriff's sales can only be invoked in cases where an action would lie. *The Trust and Loan Co.* v. *Quintal* (2 Dor. Q. B. 190), followed.

Deschamps v. *Bury*, 14th Dec., 1898 .. xxix.

19. — Municipal Corporation — By-law — Railway Aid — Subscription for Shares — Debentures — Division of County—Erection of New Municipalities—Assessment—Sale of Shares at Discount—Action en reddition de comptes—Trustee—Debtor and Creditor—Arts. 78, 164, 939, Mun. Code, Que.—24 Vic. c. 30 (Que.)—39 Vic. c. 50 (Que.).

An action *en reddition de comptes* does not lie against a trustee invested with the administration of a fund, until such administration is complete and terminated.

The relation existing between a county corporation under the provisions of the Municipal Code of the Province of Quebec and the local municipalities of which it is composed, in relation to money by-laws, is not

that of agent or trustee, but the county corporation is a creditor, and the several local municipalities are its debtors for the amount of the taxes to be assessed upon their ratepayers respectively.

Where local municipalities have been detached from a county, and erected into separate corporations, they remain in the same position, in regard to subsisting money by-laws, as they were before the division, and have no further rights or obligations than if they had never been separated therefrom, and they cannot either conjointly or individually institute actions against such county corporation to compel the rendering of special accounts of the administration of funds in which they have an interest, their proper method of securing statements being through the facilities provided by article 164, and other provisions of the Municipal Code.

The Township of Ascott v. *The County of Compton*; *The Village of Lennoxville* v. *The County of Compton*, 14th December, 1898, xxix.

20.—Bar to Action—Sheriff—Trespass—Sale of Goods by Insolvent—Bona Fides—Judgment of Inferior Tribunal — Estoppel — Res Judicata — Fraudulent Preferences—Pleading.

See Pleading, 6.

21.—Contract for Public Work—Suspension of Right of Action—Agreement for Arbitration.

See Contract, 7.

22.—Personal Injuries caused by Negligence — Examination of Plaintiff de bene esse — Death of Plaintiff—Subsequent Action under Lord Campbell's Act—Material Issues—Evidence.

See Evidence, 3.

23.—For Specific Performance—Agreement to Convey Interest in Mine—Dismissal of Action—Subsequent Suit—Agreement to transfer Part of Proceeds of Sale of Mine.

See Res Judicata, 3.

24.—Contract of Sale—Contre lettre—Principal and Agent—Construction of Contract—Actio Mandata Contraria.

See Contract, 13.

25.—Premature Action — Contract for Sale of Timber—Delivery—Time of Payment.

See Contract, 19.

26.—Right of Action—Condition Precedent—Signification of Transfer—Issue as to.

See Signification.

27.—Bar to Action—Foreign Judgment—Estoppel—Judgment obtained after Action begun—R. S. N. S. (5 ser.), c. 104, s. 12, s.-s. 7.

See Foreign Judgment.

28.—Title to Land—Action En bornage—Surveyor's Report—Chose jugee.

See Res Judicata, 5.

29.—Limitation of Action—Commencement of Prescription—Torts—Liability of Employee for Act of Contractor—Continuing Damages—Public Work.

See Perscription, 2.

30. — Action on Judgment — Partnership —Judgment against Firm — Liability of Reputed Partner.

See Partnership, 6.

See Promissory Note, 4.

31.—Action En garantie—Warranty—Delit.

See Warranty, 2.

32.—Testamentary Succession—Balance due by Tutor—Executors—Account, Action for—Action for Provisional Possession—Parties to Action.

See Practice, 35.

33.—Condition Precedent — Arbitration — Award — Action for Possession — Payment for Improvements.

See Lessor and Lessee, 1.

34.—Appeal — Jurisdiction — Appealable Amount — Monthly Allowance — Future Rights—"Other Matters and Things"—R. S. C. c. 135, s. 29 (*b*)—56 Vic. c. 29 (D.)—Established Jurisprudence in Court Appealed From.

See Appeal, 70.

35.—Action Petitoire — Title to Lands — Mistake of Title—Good Faith—Common Error—Demolition of Works—Right of Accession — Acts, 412, 413, 429, *et seq.*, 1047, 1241 C. C.

See Appeal, 68.

See Bornage, 1.

36.—Accident Insurance—Condition in Policy — Notice — Condition Precedent.

See Insurance, Accident, 2.

ADMINISTRATORS.

1.—Payment of Claim against Estate—Death of Administrator—Administration de bonis non—Unadministered Asset.

If an administrator, on competent advice, pays a claim *bonâ fide* made against the estate, the money paid is not on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator *de bonis non* a right of action to recover it back.

Mayhew v. *Stone* .. .. xxvi., 58

2. — Building Societies — Participating Borrowers—Shareholders—C. S. L. C. c. 69—42 & 43 Vic. (D.) c. 32—Liquidation—Expiration of Classes—Assessments on Loans—Notice of—Interest and Bonus—Usury Laws—C. S. C. c. 58—Art. 1785 C. C.—Administrators and Trustees—Sales to—Prete-nom—Art. 1484 C. C.

See Building Society.

3.— Fraudulent Conversion — Past due Bonds—Securities transferable by Delivery—Estoppel—Implied Notice—Innocent Holder for Value—Commercial Paper.

See Pledge, 1.

4.—Nova Scotia Probate Act—R. S. N. S. (5 ser.) c. 100, and 51 Vic. (N. S.) c. 26—License to sell Lands—Estoppel—Res judicata.

See Res Judicata, 8.

ADMIRALTY LAW.

1.—Collision—Negligence—Rule of the Road — Steamer — Sailing Vessel — Opinion of Assessors—Delegation of Judicial Powers.

In a case of collision, the marine protest by the captain of the schooner stated that the cause of the accident was that the steamer's wheel was put to port when it should have been put to starboard just before the collision. The action was twice tried, the first trial having been set aside on the ground that the judge by adopting the opinion of the assessors, had delegated his judicial functions (19 Ont. App. R. 298). The second trial resulted in a verdict for the plaintiff, which was affirmed by the Court of Appeal for Ontario.

The Supreme Court of Canada affirmed the judgment of the Court of Appeal, sustaining the plaintiff's verdict, and dismissed the appeal with costs.

Collier v. *Wright*, 6th May, 1895, xxiv., 714.

2.—Collision—Rules of the Road—Narrow Channel—Rules of Navigation—R. S. C. c. 79, s. 2, Arts. 15, 16, 18, 19, 21, 22 and 23—"Crossing" Ships—"Meeting" Ships—"Passing" Ships—Breach of Rules—Presumption of Fault — Contributory Negligence — Moiety of Damages—36 & 37 Vic. (Imp.), c. 85, s. 17—Manœuvres in "Agony of Collision."

If two vessels approach each other in the position of "passing" ships (with a side light of one dead ahead of the other), where unless the course of one or both is changed, they will go clear of each other, no statutory rule is imposed, but they are governed by the rules of good seamanship.—If one of two "passing" ships acts consistently with good seamanship and the other persists, without good reason, in keeping on the wrong side of the channel; in starboarding her helm when it was seen that the helm of the other was hard to port, and the vessels rapidly approaching; and, after signalling that she was going to port, in reversing her engines and thereby turning her bow to starboard, she is to blame for a collision which follows.

The non-observance of the statutory rule (art. 18), that steamships shall slacken speed, or stop, or reverse, if necessary when approaching another ship, so as to involve the risk of a collision, is not to be considered as a fact contributing to a collision, provided the collision could have been avoided by the impinging vessel by reasonable care exerted up to the time of the collision.

Excusable manœuvres executed in "agony of collision" brought about by another vessel, cannot be imputed as contributory negligence on the part of the vessel collided with.

The rule that in narrow channels steamships shall, when safe and practicable, keep to the starboard. (art. 21), does not override the general rules of navigation. *The Leverington* (11 P. D. 117) followed.

The Ship "Cuba" v. *McMillan, et al*, xxvi., 651

3.— Collision — Steamship — Defective Steering Apparatus — Negligence — Question of Fact.

See Appeal, 19.

4.—Seal Fishery (North Pacific) Act, 1893, 56 & 57 Vic., c. 23 (Imp.), ss. 1, 3 and 4—Judicial Notice of Order in Council Thereunder — Protocol of

EXAMINATION OF OFFENDING SHIP BY RUSSIAN WAR VESSEL, SUFFICIENCY OF —PRESENCE WITHIN PROHIBITED ZONE— BONA FIDES—STATUTORY PRESUMPTION OF LIABILITY—EVIDENCE—QUESTION OF FACT.

See Evidence, 5.

ADMISSIONS.

EVIDENCE—JUDICIAL ADMISSIONS—NULLIFIED INSTRUMENTS — CADASTRE — PLANS AND OFFICIAL BOOKS OF REFERENCE—COMPROMISE—"TRANSACTION"— ESTOPPEL—ARTS. 311 AND 1243-1245 C. C.—ARTS. 221-225 C. C. P.

A will, in favour of the husband of the testatrix, was set aside in an action by the heir at law, and declared by the judgment to be *un acte faux*, and therefore to be null and of no effect. In a subsequent petitory action between the same parties:

Held, Girouard, J., dissenting, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir at law by reason of anything the devisee had done in respect of the will, first, because the will having been annulled was for all purposes unavailable, and, secondly, because the declaration of *faux*, contained in the judgment, did not show any such admission.

The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under art. 225 C. C. P., cannot be invoked as a judicial admission in a subsequent action of a different nature between the same parties.

Statements entered upon cadastral plans and official books of reference made by public officials, and filed in the lands registration offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof at the time the entries were made.

Where a deed entered into by the parties to a suit in order to effect a compromise of family disputes, and prevent litigation, failed to attain its end, and was annulled and set aside by order of the court as being in contravention of article 311 of the Civil Code of Lower Canada, no allegation contained in it could subsist even as an admission.

Durocher v. *Durocher* .. .. .. xxvii., 363

AFFIDAVIT.

1.—CHATTEL MORTGAGE—COMPLIANCE WITH STATUTORY FORM—R. S. N. S. [5 SER.], c. 92, s. 4.

See Chattel Mortgage, 1.

2.—BONA FIDES — CHATTEL MORTGAGE — COMPLIANCE WITH STATUTORY FORMS.

See Chattel Mortgage, 2.

AFFREIGHTMENT.

CHARTER PARTY—CONTRACT—NEGLIGENCE—STOWAGE — FRAGILE GOODS — BILL OF LADING—NOTICE—ACTS 1674, 1675, 1676, 2383, 2390, 2409, 2413, 2424, 2427, C. C. —FAULT OF SERVANTS.

See Carriers, 4.

AGENCY.

See Principal and Agent.

See Contract.

AGENT.

1.— INSURANCE AGENT — DUTY TOWARDS COMPANY—ACTING FOR RIVAL COMPANY —DIVIDED INTERESTS—DISMISSAL.

Acting as the agent of a rival insurance company is a breach of an insurance agent's agreement, "to fulfil conscientiously all the duties assigned to him, and to act constantly for the best interests of" his employer, and is sufficient justification for his dismissal.

Judgment of the Court of Appeal for Ontario (22 Ont. App. R. 408), affirmed.

Eastmure v. *The Canada Accident Assurance Co.*, 22nd February, 1896 .. .. xxv., 691

2.—AGENT OF CREDITOR — OBTAINING PAYMENT FROM DEBTOR—FALSE REPRESENTATION — FRAUD—RATIFICATION—INDICTABLE OFFENCE.

See Debtor and Creditor, 3.

3.— SALE OF GOODS — SALE THROUGH BROKERS — AUTHORITY OF BROKERS — ACQUIESCENCE.

See Principal and Agent, 1.

4.—RAILWAY COMPANY—CARRIAGE OF GOODS — CONNECTING LINES — AUTHORITY OF AGENT.

See Contract, 17.

5.—INSURANCE COMPANY — GENERAL MANAGER —MEDICAL EXAMINER—AGREEMENT WITH—AUTHORITY OF MANAGER.

See Contract, 18.

6.—INSURANCE COMPANY — AUTHORITY — WAIVER.

See Principal and Agent, 8.

AGREEMENT.

1.—Sale of Land—Vendor and Purchaser—Agreement to sell—Title under Will—Restriction—Part Performance—Special Legislation—Compliance with Terms of.

See Specific Performance, 1.

2.—Charge upon Lands — Mortgage — Statute of Frauds—Registration.

See Mortgage, 5.

3.—Sale of Land—Vendor and Purchaser—Principal and Agent—Mistake—Contract—Agreement for Sale of Land—Agent Exceeding Authority—Findings of Fact.

See Contract, 43.

4.—Vendor and Purchaser—Agreement for Sale of Lands—Assignment by Vendee — Principal and Surety — Deviation from Terms of Agreement—Giving Time—Creditor Depriving Surety of Rights—Secret Dealings with Principal—Release of Lands—Arrears of Interest—Novation—Discharge of Surety.

See Principal and Surety, 3.

5.— Municipal Corporation — By-law — Assessment — Local Improvements — Agreement with Owners of Property — Construction of Subway — Benefit to Land.

See Municipal Corporation, 28.

And *see* "Contract."

ALIMENTARY ALLOWANCE.

1.—Appeal—Jurisdiction—Future Rights—Alimentary Allowance—R. S. C. c. 135, s. 29, s.-s. 2; 54 & 55 Vic. c. 25, s. 3; 56 Vic. c. 29, s. 2.

Actions or proceedings respecting disputes as to mere personal alimentary pensions or allowances do not constitute controversies wherein rights in future may be bound within the meaning of the second sub-section of the twenty-ninth section of "The Supreme and Exchequer Courts Act" as amended, which allows appeals to The Supreme Court of Canada from judgments rendered in the Province of Quebec in cases where the controversy relates to "annual rents or other matters or things where rights in future might be bound." *Macfarlane* v. *Leclaire*, (15 Moo. P. C. 181), distinguished; *Sauvageau* v. *Gauthier*, E. L. R. 5 P. C. 494), followed.

LaBanque du Peuple v. *Trottier*, xxviii., 422

2.—Appeal — Jurisdiction — Appealable Amount—Future Rights—Alimentary Allowance—"Other Matters and Things."

See Appeal, 58.

3.—Will—Construction of — Donation — Partition per stirpes or per capita—Usufruct—Accretion Between Legatees.

See Substitution, 1.

4.—Appeal — Jurisdiction — Appealable Amount — Monthly Allowances — Future Rights.

See Appeal, 70.

APPEAL.

1.—Appeal—Cross-Appeal Pending in Privy Council—Stay of Proceedings—Practice.

At the hearing of the appeal it appeared that the respondent had taken an appeal from the same judgment to Her Majesty's Privy Council, and that the respondent's said appeal was then pending before the Judicial Committee of the Privy Council. The court, in consequence, stopped the arguments of counsel and ordered that the hearing of the appeal to the Supreme Court of Canada should stand over until after the adjudication of the said appeal to the Privy Council.

McGreevy v. *McDougall*, 3rd March, 1888.

2.—Jurisdiction—Amount in Dispute—R. S. C. c. 135, s. 29—54 & 55 Vic. c. 25, s. 3, s.-s. 4 (D.).

Prior to the passing of the Act, 54 & 55 Vict. ch. 25, amending *The Supreme and Exchequer Courts Act*, and declaring that, where the right of appeal depended upon the amount in controversy, the amount in dispute should be deemed to be that demanded by the action, and not the amount recovered, if they were different, the Superior Court, at Montreal, dismissed an action for $5,000 damages by a judgment which was reversed on appeal, and the entry of judgment for $600 in favour of the plaintiff was ordered by the Court of Queen's Bench. The defendant then appealed to the Supreme Court of Canada.

On motion to quash for want of jurisdiction,

Held, following *Cowen* v. *Evans*; *Mitchell* v. *Trenholme*, and *Mills* v. *Limoges* (22 Can. S. C. R. 331), that the Supreme Court of Canada had no jurisdiction to entertain the appeal.

The Montreal Street Railway Co. v. *Carrière*, 11th October, 1893.

(See footnote at page 335 of Vol. 22, Can. Sup. Ct. Reps.)

3.—Election Petitions—Separate Trials—R. S. C. c. 9, ss. 30 and 50—Ruling on Objection.

The ruling of the court below on an objection in proceedings on an election petition, viz.: That the trial judges could not proceed with the petition in this case, because the two petitions filed had not been bracketed by the prothonotary as directed by sec. 30 of ch. 9 R. S. C., is not an appealable judgment or decision. R. S. C. ch. 9, s. 50. (Sedgewick, J., doubting).

Vaudreuil Election Case .. .. .. xxii., 1

4.—Jurisdiction—Criminal Proceeding—Contempt of Court—Final Judgment R. S. C. c. 135, s. 68.

Contempt of court is a criminal proceeding and unless it comes within sec. 69 of the Sup. Court Act an appeal does not lie to this court from a judgment in proceedings therefor. *O'Shea* v. *O'Shea* (15 P. D. 59) followed; *In re O'Brien* (16 Can. S. C. R. 197), referred to.

In proceedings for contempt of court by attachment until sentence is pronounced there is no "final judgment" from which an appeal could be brought.

Ellis v. *The Queen* .. .. xxii., 7

5.—Trial by Jury—Withdrawal from Jury—Reference to Court—Consent of Parties—Railway Co.—Negligence.

On the trial of an action against a railway company for injuries alleged to have been caused by negligence of the servants of the company in not giving proper notice of the approach of a train at a crossing, whereby plaintiff was struck by the engine and hurt, the case was withdrawn from the jury by consent of counsel for both parties and referred to the full court, with power to draw inferences of fact and on the law and facts either to assess damages to the plaintiff or enter a judgment of non-suit.

On appeal from the decision of the full court assessing damages to plaintiff.

Held, Gwynne and Patterson, JJ., dissenting, that as by the practice in the Supreme Court of New Brunswick all matters of fact must be decided by the jury, and can only be entertained by the court by consent of parties, the full court in considering the case pursuant to the agreement at the trial acted as a quasi-arbitrator and its decision was not open to review on appeal as it would have been if the judgment had been given in the regular course of judicial procedure in the court.

Held, further that if the merits of the case could be entertained on appeal the judgment appealed from should be affirmed.

Held, per Gwynne and Patterson, JJ., that the case was properly before the court and as the evidence showed that the servants of the company had complied with the statutory requirement as to giving notice of the approach of the train the company was not liable.

The Canadian Pacific Ry. Co. v. *Fleming*, xxii., 33

6.—Right of Appeal—54 & 55 Vic. c. 25—Construction of.

By sec. 3, ch. 25, of 54 & 55 Vic., an appeal is given to the Supreme Court of Canada from the judgment of the Superior Court in Review (Que.) "where and so long as no appeal lies from the judgment of that court when it confirms the judgment rendered in the court appealed from, which by the law of the Province of Quebec is appealable to the Judicial Committee of the Privy Council." The judgment in this case was delivered by the Superior Court on the 17th November, 1891, and was affirmed unanimously by the Superior Court, in Review, on the 29th February, 1892, which latter judgment was by the law of the Province of Quebec appealable to the Judicial Committee. The statute 54 & 55 Vic. c. 29, was passed on the 30th September, 1891, but the plaintiff's action had been instituted on the 22nd November, 1890, and was standing for judgment before the Superior Court in the month of June, 1891, prior to the passing of 54 & 55 Vic. c. 25. On an appeal from the judgment of the Superior Court, in Review, to the Supreme Court of Canada, the respondent moved to quash the appeal for the want of jurisdiction.

Held, per Strong, C.J., and Fournier and Sedgewick, JJ., that the right of appeal given by 54 & 55 Vic. c. 25, did not extend to cases standing for judgment in the Superior Court prior to the passing of the said Act. *Couture* v. *Bouchard*, (21 Can. S. C. R. 181), followed. Taschereau and Gwynne, JJ., dissenting.

Held, per Fournier, J.—That the statute is not applicable to cases already instituted or pending before the courts, no special words applicable to cases already instituted or to that effect being used.

Williams v. *Irvine* .. .. xxii., 108

7.—New Trial—Appeal from Order for—Final Judgment.

In an action brought to recover damages for the loss of certain glass delivered to defendants for carriage, the Judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question

submitted the jury disagreed. Defendant then moved the Divisional Court for judgment, but pending such motion the plaintiffs applied for and obtained an order of the court amending the statement of claim, and charging other grounds of negligence. The defendants submitted to such order and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial, but was not tried before the Divisional Court pronounced judgment on the motion dismissing plaintiff's action. On appeal to the Court of Appeal, the judgment of the Divisional Court was reversed and a new trial ordered.

On appeal to the Supreme Court;

Held, that the judgment of the Court of Appeal ordering a new trial in this case was not a final judgment nor did it come within any of the provisions of the Supreme Court Act authorizing an appeal from judgments not final.

Canadian Pacific Ry. Co. v. *Cobban Mfg. Co.* .. .. xxii., 132

8.—Sheriff's Sale of Immovable—Action to Vacate—Appeal from Judgment in.

An appeal will lie to the Supreme Court under sec. 29 (b) of the Supreme Court Act from the judgment in an action to vacate the sheriff's sale of an immovable. *Dufresne* v. *Dixon* (16 Can. S. C. R. 596) followed.

Lefeuntun v. *Veronneau* .. .. .. xxii., 203

9.—Appeal—Amount in Controversy—R. S. C. c. 135—54 & 55 Vic. c. 25—Costs.

C. brought an action against E., claiming: 1. That a certain building contract should be rescinded; 2. $1,000 damages; 3. $545 for value of bricks in possession of E., but belonging to C. The judgment of the Superior Court dismissed C.'s claim for $1,000 but granted the other conclusions. On appeal to the Court of Queen's Bench by E., the action was dismissed in 1893. C. then appealed to the Supreme Court.

Held, that the building for which the contract had been entered into having been completed, there remained but the question of costs and the claim for $545 in dispute between the parties and that amount was not sufficient to give jurisdiction to the Supreme Court under R. S. C. c. 135, s. 29.

Cowan v. *Evans* .. .. xxii., 328

10.—Jurisdiction—Right to Appeal—54 & & 55 Vic. c. 25, s. 3, s.-s. 4—Amount in Dispute—R. S. C. c. 135, s. 29.

The statute 54 & 55 Vic., c. 25, s. 3, which provides that "whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different" does not apply to cases in which the Superior Court has rendered judgment, or to cases argued and standing for judgment (*en délibére*) before that court, when the act came into force (30th September, 1891). *Williams* v. *Irvine* (22 Can. S. C. R. 108) followed.

In actions for damages claiming more than $2,000, the Court of Queen's Bench for Lower Canada on appeal in one case gave plaintiff judgment for $800, reversing the judgment of the Superior Court which had dismissed the actions, and in the other cases, on appeal by the defendants, affirmed the judgments of the Superior Court giving damages for an amount less than $2,000.

Held, following *Monette* v. *Lefebvre* (16 Can. S. C. R. 387) that no appeal would lie to the Supreme Court in these cases by the defendants from the judgment of the Court of Queen's Bench under sec. 29 of chap. 135 R. S. C. Gwynne, J., dissenting.

Cowan v. *Evans.*

Mitchell v. *Trenholme.*

Mills v. *Limoges* .. .. xxii., 331

11.—Opposition afin de conserver on Proceeds of a Judgment for $1,129—Amount in Dispute—Right to Appeal R. S. C. c. 135, s. 29.

K. (plaintiff) contested an opposition *afin de conserver* for $24,000 filed by L. on the proceeds of a sale of property upon the execution by K. against H. & Co. of a judgment obtained by K. against H. & Co. for $1,129. The Superior Court dismissed L.'s opposition but on appeal the Court of Queen's Bench (appeal side) maintained the opposition and ordered that L. be collocated *au marc la livre* on the sum of $930, being the amount of the proceeds of the sale.

Held, that the pecuniary interest of K. appealing from the judgment of the Court of Queen's Bench (appeal side) being under $2,000 the case was not appealable under R. S. C. c. 135, s. 29. *Gendron* v. *McDougall* (Cass. Dig., 2 ed., 429), followed.

Held also, that sec. 3 of 54 & 55 Vic., c. 25, providing for an appeal where the amount demanded is $2,000 or over has no application to the present case.

Kinghorn v. *Larue* .. .. .. xxii., 347

12.—Criminal Trial—Motion for Reserved Case—Unanimity on one of Several Grounds.

Where the Court appealed from has affirmed the refusal to reserve a case moved for at

a criminal trial on two grounds, and is unanimous as to one of such grounds but not as to the other, the Supreme Court on appeal can only take into consideration the ground of motion in which there was dissent.

McIntosh v. *The Queen* .. .. .. xxiii., 180

13.—Judicial Discretion—Executors and Trustees—Accounts.

The Supreme Court of Canada, on appeal from a decision affirming the report of a referee in a suit to remove executors and trustees which report disallowed items in accounts previously passed by the Probate Court, will not reconsider the items so dealt with, two Courts having previously exercised a judicial discretion as to the amounts and no question of principle being involved.

Grant v. *McLaren* .. .. xxiii., 310

14.—Public Street—Encroachment on—Building "upon" or "close to" the line—Charter of Halifax, secs. 454, 455—Petition to Remove Obstruction—Judgment on—Variance.

By sec. 454 of the charter of the City of Halifax any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the City Engineer and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained the Supreme Court, or a Judge thereof, may, on petition of the Recorder, cause it to be removed. On appeal from the decision of the Supreme Court of Nova Scotia reversing the judgment of a Judge under this section, an objection was taken to the jurisdiction of the Supreme Court of Canada on the ground that the petition having been presented to a Judge in Chambers the matter did not originate in a Superior Court.

Held, Taschereau, J., dissenting, that the Court had jurisdiction. *Canadian Pacific Railway Co.* v. *Ste. Therese* (16 Can. S. C. R. 606), and *Virtue* v. *Hayes* (16 Can. S. C. R. 721) distinguished.

City of Halifax v. *Reeves* .. .. xxiii., 340

15.—Action Negatoria Servitutis—Amount in Controversy—Future Rights—R. S. C. c. 135, s. 29 (*b*)—56 Vic. c. 29, s. 1.

In an *action negatoire* the plaintiff sought to have a servitude claimed by the defendant declared non-existent, and claimed $30 damages. *Held*, that under 56 Vic., c. 29, s. 1, amending R. S. C. c. 135, s. 29 (*b*), the case was appealable, the question in controversy relating to matters where the rights in future might be bound. *Wineberg* v. *Hampson* (19 Can. S. C. R. 369) distinguished.

Chamberland v. *Fortier* .. .. xxiii., 371

16.—Expropriation—35 Vic. c. 32, s. 7 (Que.)—Interference with award of Arbitrators.

In a matter of expropriation the decision of a majority of arbitrators, men of more than ordinary business experience, upon a question merely of value should not be interfered with on appeal.

Lemoine v. *City of Montreal.*

Allan v. *City of Montreal* .. .. xxiii., 390

17.—Pleadings—Objection First Raised on Appeal.

An objection to the sufficiency of the traverse to a declaration will not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient.

Mylius v. *Jackson* .. .. .. xxiii., 458

18.—Cross-appeal—Rules 62 and 63—Compliance with.

A cross-appeal will be disregarded by the Court when rules 62 and 63 of the Supreme Court Rules have not been complied with.

Bulmer v. *The Queen* .. .. .. xxiii., 488

19.—Collision at Sea—Negligence—Defective Steering Gear—Question of Fact—Interference with Decision of Local Judge in Admiralty.

In an action against the owners of the "Santanderino" for damages by collision with respondent's barque, the "Juno," through the breaking down of the steering apparatus, the Local Judge in Admiralty, District of Nova Scotia, who was assisted on the trial by a nautical assessor, found that the steering gear was constructed on an approved patent, and was in good order when the "Santanderino" started on her voyage, but that the collision was due to want of prompt action by the master and officers when the wheel refused to work (3 Ex. C. R. 378).

On appeal to the Supreme Court of Canada, it was *Held*, Sedgewick and King, JJ., dissenting, that only a question of fact was involved, and though it was doubtful if the evidence was sufficient to warrant the finding, the decision was not so clearly wrong as to justify an appellate court in reversing it.

S.S. "Santanderino" v. *Vanvert et al*, 13th March, 1893 .. .. xxiii., 145

20.—Bond in Appeal—School Mistress—Fee of Office—Future Rights—R. S. C. c. 135, s. 29 (*b*)—C. S. L. C. c. 15, s. 68—R. S. Q. Art. 2073.

E. Larivière, a school mistress, by her action claimed $1,243 as fees due to her in virtue of sec. 69, chap. 15, C. S. L. C., which was collected by the School Commissioners of the City of Three Rivers, while she was employed by them. At the time of the action the plaintiff had ceased to be in their employ. The Court of Queen's Bench for Lower Canada (appeal side) affirming the judgment of the Superior Court, dismissed the action.

On motion before the Supreme Court of Canada to allow a bond in appeal, which had been refused by a Judge of the court below, the Registrar of the Supreme Court and a Judge of that court, in Chambers, on the ground that the case was not appealable.

Held, that the matter in controversy did not relate to any office or fee of office within the meaning of sec. 29 (*b*) of the Supreme and Exchequer Courts Act, R. S. C. c. 135.

2. Even assuming it did, no rights in future would be bound, and the amount in dispute being less than $2,000 the case was not appealable.

3. The words "where the rights in future might be bound" in sub-section (*b*) of sec. 29 govern all the preceding words "any fee of office, etc." *Chagnon* v. *Normand* (16 Can. S. S. R. 661); *Gilbert* v. *Gilman* (16 Can. S. C. R. 189); *Bank of Toronto* v. *Les Curé, etc., de St. Vierge* (12 Can. S. C. R. 25), referred to.

Lariviére v. *School Commissions for Three Rivers* .. .. xxiii., 723

21.—Amount in Controversy—Pecuniary Interest—R. S. C. c. 135, s. 29—Contract of Sale—Contre lettre—Principal and Agent—Construction of Contract.

The plaintiff, who had acted as agent for the late J. B. S., brought an action for $1,471.07 for a balance of account as *negotiorum gestor* of J. B. S., against the defendants, executors of J. B. S. The defendants, in addition to a general denial, pleaded compensation for $3,416 and interest. The plaintiff replied that this sum was paid by a *dation en paiement* of certain immovables. The defendants answered that the transaction was not a giving in payment but a giving of a security. The Court of Queen's Bench, reversing the judgment of the Superior Court, held that the defendants had been paid by the *dation en paiement* of the immovables, and that the defendants owed a balance of $1,154 to the plaintiff.

Held, that the pecuniary interest of the defendants, affected by the judgment appealed from, was more than $2,000 over and above the plaintiff's claim and therefore the case was appealable under R. S. C. c. 135, s. 29.

Hunt v. *Taplin* .. .. xxiv., 36

22.—Right of Appeal—Petition to Quash By-law under s. 4,389 R. S. Q.—R. S. C. c. 135, s. 24 (*g*).

Proceedings were commenced to quash a by-law passed by the Corporation of the City of Sherbrooks under sec. 4,389 R. S. Q. which gives the right to petition the Superior Court to annul a municipal by-law. The judgment appealed from, reversing the judgment of the Superior Court, held that the by-law was *intra vires*.

On motion to quash an appeal to the Supreme Court of Canada:

Held, that the proceedings being in the interest of the public, are equivalent to the motion or rule to quash of the English practice, and therefore the court had jurisdiction to entertain the appeal, under sub-section (*g*) of sec. 24, ch. 135, R. S. C. *Sherbrooke* v. *McManamy* (18 Can. S. C. R. 594) and *Verchères* v. *Varennes* (19 Can. S. C. R. 356) distinguished.

Webster v. *City of Sherbrooke* .. xxiv., 52

23.—Supreme and Exchequer Courts Act, R. S. C. c. 135, ss. 24 and 29—Costs.

Held, that a judgment in an action by a ratepayer contesting the validity of an homologated valuation roll is not a judgment appealable to the Supreme Court of Canada under section 24 (*g*) of the Supreme and Exchequer Courts Act, and does not relate to future rights within the meaning of sub-section (*b*) of section 29, of the Supreme and Exchequer Courts Act.

Held, also, that as the valuation roll sought to be set aside in this case had been duly homologated and not appealed against within the delay provided in Art. 1061 (Mun. Code, Que), the only matter in dispute between the parties was a mere question of costs, and therefore the court would not entertain the appeal. *Moir* v. *Corporation of the Village of Huntingdon* (19 Can. S. C. R. 363), followed; *Webster* v. *Sherbrooke* (24 Can. S. C. R. 52), distinguished.

McKay v. *Township of Hinchinbrooke*, xxiv., 55

24.—Amount in Dispute—54 & 55 Vic., c. 25, s. 3, s.-s. 4.

By virtue of s.-s. 4 of s. 3 of c. 25 of 54 & 55 V., in determining the amount in dispute in cases in appeal to the Supreme Court of

Canada, the proper course is to look at the amount demanded by the statement of claim, even though the actual amount in controversy in the Court appealed from was for less than $2,000. This where the plaintiff obtained a judgment in the Court of original jurisdiction for less than $2,000, and did not take a cross appeal upon the defendants appealing to the intermediate Court of Appeal where such judgment was reversed, he was entitled to appeal to this Court. *Levi* v. *Reid* (6 Can. S. C. R. 482), restored, affirmed and followed. Gwynne, J., dissenting.

Laberge v. *Equitable Life Assurance Society*, xxiv., 59

25.—Matters of Procedure—Interference with, on Appeal.

Decisions of provincial courts resting upon mere questions of procedure will not be interfered with on appeal to the Supreme Court of Canada except under special circumstances.

Ferrier v. *Trepannier* .. .. .. xxiv., 86

26.—Appeal in Matter of Procedure—Art. 188 C. C. P.

A judgment of the Court of Queen's Bench for Lower Canada (appeal side) held that a *venditioni exponas* issued by the Superior Court at Montreal, to which court the record in contestation of an opposition had been removed from the Superior Court of the District of Iberville, under art. 188 C. C. P., was regular.

On an appeal to the Supreme Court of Canada;

Held, that on a question of practice such as this the Court would not interfere. *Mayor of Montreal* v. *Brown* (2 App. Cas. 184) followed.

Arpin v. *Merchants Bank of Canada*, xxiv., 142

27.—Evidence—Questions of Fact.

Held, per Strong, C.J., that although the case might properly have been left to the jury, the judgment of non-suit, having been affirmed by two courts, should not be interfered with.

Headford v. *McClary Mfg. Co.* .. xxiv., 291

28.—Practice—Reference—Report of Referee—Time for Moving Against—Notice of Appeal—Cons. Rules 848, 849—Extension of Time—Confirmation of Report by Lapse of Time.

In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to sec. 101 of the Judicature Act and Rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed, and that V. was entitled to $600 damages. The municipality appealed to the Divisional Court from the report, and the court held that the appeal was too late, no notice having been given within the time required by Cons. Rule 848, and refused to extend the time for appealing. A motion for judgment on the report was also made by V. to the court on which it was claimed on behalf of the municipality that the whole case should be gone into upon the evidence, which the court refused to do.

Held, affirming the decision of the Court of Appeal, that the appeal not having been brought within one month from the date of the report, as required by Cons. Rule 848, it was too late; that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which the Supreme Court would not interfere.

Township of Colchester South v. *Valed*, xxiv., 622

29.—Jurisdiction—Future Rights—R. S. C. c. 135, s. 29 (*b*)—56 Vic., c. 29 (D.).

By R. S. C. c. 135, s. 29 (*b*), amended by 56 V. c. 29 (*D*), an appeal will lie to the Supreme Court of Canada from the judgments of the Courts of hightest resort in the Province of Quebec, in cases where the amount in controversy is less than $2,000, if the matter relates to any title to lands or tenements, annual rents and other matters or things where the rights in future might be bound.

Held, that the words "other matters or things" mean rights of property analogous to title to lands, etc., which are specifically mentioned, and not personal rights; that "title" means a vested right or title already acquired though the enjoyment may be postponed; and that the right of a married woman to an annuity provided by her marriage contract in case she should become a widow is not a right in future which should authorize an appeal in an action by her husband against her for *separation de corps* in which if judgment went against her the right to the annuity would be forfeited.

O'Dell v. *Gregory* .. .. xxiv., 661

30.—Special Leave—Per saltum.

On motion for leave to appeal direct from a decision of the Divisional Court (Ontario), it appeared that the action was brought to replevy from appellant the books which he

held as clerk of the corporation, he having been dismissed from the office. He refused to give up the books, on the ground that his dismissal was illegal. Judgment was given for the corporation at the trial, and affirmed by the Divisional Court, and an application for special leave to appeal was refused by the Court of Appeal for Ontario.

The motion was first made to the Registrar of the Supreme Court, in Chambers, for leave to appeal *per saltum* and was dismissed. An appeal from this order to a Judge in Chmabers was dismissed, and a further appeal was taken to the full Court.

The court held that appellant had failed to show sufficient cause to justify the order asked for.

Bartram v. *The Village of London West*, 13th March, 1895 .. .. xxiv., 705

31. — JURISDICTION — WINDING-UP ACT — AMOUNT IN CONTROVERSY—AGGREGATE LIABILITY—JOINT OR SEPARATE LIABILITY—CONTRIBUTORIES.

A decision of the Court of Appeal from Ontario, reversed the order of the Master in Ordinary settling the respondents on the list of contributories under the Winding-up Act. Appeal lies to the Supreme Court of Canada, in proceedings under the Winding-up Act, only where the amount involved is $2,000 or over. In this case there were six persons placed on the list by the Master; one for $1,000, and the others for $900 each, and all were released from liability by the decision of the Court of Appeal from which this appeal was brought.

The Supreme Court held that although the aggregate amount for which the respondents were sought to be made liable exceeded $2,000, there was no jurisdiction under the Act to entertain the appeal, because the position was the same as if proceedings had been taken separately against each of the contributories.

The appeal was quashed with costs.

Stephens v. *Gerth et al. In re The Ontario Express and Transportation Co.*, 16th May, 1895 .. .. xxiv., 716

32.— JURISDICTION — AWARD BY DRAINAGE REFEREE—54 VIC., C. 51 (ONT.)—R. S. C., C. 135, S. 24—COSTS.

A judgment of the Court of Appeal for Ontario, affirming the decision or award of a referee under the provisions of "The Drainage Trials Act, 1891." (Ont.), is not appealable to the Supreme Court of Canada under sub-section (*f*), of section 24, or any other provision of "The Supreme and Exchequer Courts Act." (Gwynne, J., dissented from the judgment of the majority of the Court).

MEMO. The question as to jurisdiction having been taken by the Court, the appeal was dismissed without costs).

The Township of Harwich v. *The Township of Raleigh*, 18th May, 1895.

33.— COURT OF REVIEW — JURISDICTION — MANDAMUS—54 & 55 VIC., C. 25, S. 3 (D.) COSTS.

B. applied for a mandamus to compel the Corporation of the City of Montreal to carry out the provisions of one of its by-laws. The writ of mandamus was granted by the Superior Court, but on appeal, this judgment was reversed by the Court of Review, and the petition for mandamaus dismissed. B. then instituted an appeal from the latter judgment to the Supreme Court of Canada.

On motion to quash the appeal:

Held, that the case was not within the provisions of 54 & 55 Vic. c. 25, s. 3, allowing appeals from the Court of Review in certain cases, and that as the appeal was not from the judgment of the Court of Queen's Bench (appeal side), the court of highest resort in the province, there was no jurisdiction in the Supreme Court of Canada to entertain it. *Danjou* v. *Marquis*, (3 Can. S. C. R. 251), and *McDonald* v. *Abbott*, (3 Can. S. C. R. 278), followed.

As the point upon which the appeal was quashed had not been taken in the factum, nor by the motion, the appeal was quashed without costs.

Barrington v. *The City of Montreal*, 8th October, 1895 .. .. xxv., 202

34. — SCHOOL CORPORATION — DECISION OF SUPERINTENDENT OF PUBLIC INSTRUCTION — FINAL JUDGMENT — MANDAMUS— R. S. O. ARTS. 2055, 2056—55 & 56 VIC., C. 24, SS. 18 AND 19 (QUE.)— PRACTICE.

Under the provisions of article 2055 of the Revised Statutes of Quebec, as amended by 55 and 56 Vic. c. 24, ss. 18 and 19, certain ratepayers of a school district appealed to the Superintendent of Public Instruction for the Province of Quebec, who thereupon rendered a decision, and gave orders and directions respecting the erection of a school house, which, however, the School Commissioners neglected to perform.

Held, affirming the judgment appealed from, that in such cases, the decision of the Superintendent of Public Instruction was final; that no appeal therefrom would lie to the Superior Court, and that the proper

remedy to enforce the execution of the orders and directions of the Superintendent was by mandamus.

Les Commissaires d'Ecole de St. Charles v. *Cordeau et al*, 9th December, 1895.

35.—Appeal for Costs, When it Lies—Action in Warranty—Proceedings Taken by Warrantee before Judgment on Principal Demand.

Though an appeal will not lie in respect of costs only, yet where there has been a mistake upon some matter of law, or of principle, which the party appealing, has an actual interest in having reviewed, and which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal.

Archbald v. *DeLisle.*

Baker v. *DeLisle.*

Mowat v. *DeLisle* .. .. xxv., 1

36.—By-law—Petition to Quash—Appeal to Court of Queen's Bench—40 Vic., c. 29 (Que.)—53 Vic., c. 70 (Que.)—Judgment Quashing—Appeal to Supreme Court—R. S. C. c. 135, s. 24 (*g*).

Sec. 439 of the Town Corporations Act (40 Vic. c. 29 (Que.), not having been excluded from the charter of the city of Ste. Cunegonde (53 Vic. c. 70) is to be read as forming a part of it, and prohibits an appeal to the Court of Queen's Bench from a judgment of the Superior Court on a petition to quash a by-law presented under s. 310 of said charter.

Where the Court of Queen's Bench has quashed such an appeal for want of jurisdiction, no appeal lies to the Supreme Court of Canada from its decision.

City of Ste. Cunegonde de Montréal v. *Gougeon et al* .. .. xxv., 78

37.—Questions of Fact—Reversal on.

If a sufficently clear case is made out, the Court will allow an appeal on mere questions of fact against the concurrent findings of two Courts. *Arpin* v. *The Queen* (14 Can. S. C. R. 736); *Schwersenski* v. *Vineberg* (19 Can. S. C. R. 243); and *City of Montreal* v. *Lemoine* (23 Can. S. C. R. 390) distinguished.

The North British and Mercantile Insurance Co. v. *Tourville et al* .. .. xxv., 177

38.—Mandamus—Judgment of Court of Review.

54 & 55 V. c. 25 (D.) does not authorize an appeal to the Supreme Court of Canada from a decision of the Court of Review in a case where the judgment of the Superior Court is reversed and there is an appeal to the Court of Queen's Bench. *Danjou* v. *Marquis* (3 Can. S. C. R. 251) and *McDonald* v. *Abbott* (3 Can. S. C. R. 278) followed.

Barrington et al v. *The City of Montreal*, xxv., 202

39.—Increasing Damages without Cross-appeal—Rule 61, Supreme Court Rules—Special Statute.

Under the Ontario Judicature Act, R. S. O. [1887] c. 44, ss. 47 and 48, the Court of Appeal has power to increase damages awarded to a respondent without a cross-appeal, and the Supreme Court has the like power under its rule No. 61. Taschereau, J., dissenting.

Per Strong, C.J.—Though the Court will not usually increase such damages without a cross-appeal, yet where the original proceedings were by arbitration under a statute providing that the Court, on appeal from the award, shall pronounce such judgment as the arbitrators should have given, the statute is sufficient notice to an appellant of what the Court may do, and a cross-appeal is not necessary.

The Town of Toronto Junction v. *Christie*, xxv., 551

40.—Master and Servant—Negligence of Servant—Deviation from Employment—Resumption—Contributory Negligence—Infant—Evidence.

If in a case tried without a jury, evidence has been improperly admitted, a Court of Appeal may reject it and maintain the verdict if the remaining evidence warrants it.

Merritt v. *Hepenstal* .. .. .. xxv., 150

41.—Final Judgment—Petition for leave to Intervene—Judgment on—Interlocutory Proceedings.

No appeal lies to the Supreme Court from the judgment of the Court of Queen's Bench on a petition for leave to intervene in a cause, the proceedings being interlocutory only.

Hamel v. *Hamel* .. .. xxvi., 7

42.—Judge's Notes—Additions after Notice of Appeal.

Per Taschereau, J.—Where a Court had pronounced judgment in a cause before it, and after proceedings in appeal had been instituted certain of the judges filed documents with the prothonotary purporting to be additions to their respective opinions in the case, such documents were improperly

allowed to form part of the case on appeal and could not be considered by the appellate court.

Mayhew v. *Stone* .. .. xxvi., 58

43.—Technical Grounds—Surprise.

An appellate court will not give effect to mere technical grounds of appeal, against the merits, and where there has been no surprise or disadvantage to the appellant.

Gorman v. *Dixon* .. .. xxvi., 87

44.—Assessment of Damages—Questions of Fact.

The Supreme Court of Canada will not interfere with the amount of damages assessed by a judgment appealed from if there is evidence to support it.

The Montreal Gas Co. v. *St. Laurent.*

The City of St. Henri v. *St. Laurent*, xxvi., 176

45.—Amount in Controversy—Pecuniary Interest of Appellant—Arts. 746, 747, C. C. P.

L. having proved a claim of $920 against an insolvent estate contested a claim for which respondents had been collocated against the same estate amounting to $2,044.66. The contestation having been decided in favour of respondent, L. appealed to the Supreme Court.

Held, that to determine whether or not there was a sufficient amount in controversy to give jurisdiction to the Supreme Court the pecuniary interest of the appellant only could be taken into consideration, and his interest being under $2,000 the appeal would not lie, although the consequence of the appellant's contestation might result in bringing back to the insolvent estate a sum of over $2,000.

Lachance v. *La Société de Prêts et de Placements de Québec* .. .. xxvi., 200

46.—Appeal from Court of Review—Appeal to Privy Council—Appealable Amount—Addition of Interest—C. C. P. Arts. 1115, 1178, 1178*a*—R. S. Q. Art. 2311—54 & 55 Vic. (D.), c. 25, s. 3, s.-s. 3—54 Vic. (Que.), c. 48 (amending C. C. P. Art. 1115).

Under 54 & 55 Vic. (D.), c. 25, s. 3, s.-s. 3, there is no appeal to the Supreme Court of Canada from a decision of the Court of Review, which would not be appealable as of right to the Privy Council.

Article 2311, R. S. Q., which provides that "whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered if they are different" applies to appeals to the Privy Council.

Interest cannot be added to the sum demanded to raise it to the amount necessary to give a right of appeal. *Stanton* v. *Home Ins. Co.* (2 Legal News 314) approved.

Dufresne et al. v. *Guevremont* .. xxvi., 216

47—Order to Amend Pleadings—Interference with—Discretion of Court Below—Procedure.

The Supreme Court will not interfere on appeal with an order made by a provincial court granting leave to amend the pleadings, such orders being a matter of procedure within the discretion of the court below.

Williams v. *Leonard & Sons* .. xxvi., 406

48.—Appeal—Jurisdiction—Judicial Proceeding — Opposition to Judgment — Arts 484-493 C. C. P.—R. S. C. c. 135, s. 29—Appealable Amount—54 & 55 Vic., c. 25, s. 3, s.-s. 4—Retrospective Legislation.

An opposition filed under the provisions of articles 484 and 487 of the Code of Civil Procedure of Lower Canada for the purpose of vacating a judgment entered by default, is a "judicial proceeding" within the meaning of sec. 29 of "The Supreme and Exchequer Courts Act," and where the appeal depends upon the amount in controversy, there is an appeal to the Supreme Court of Canada if the amount of principal and interest due at the time of the filing of the opposition under the judgment sought to be annulled is of the sum or value of $2,000.

Turcotte v. *Dansereau* .. .. .. xxvi., 578

49.— Time Limit — Commencement of — Pronouncing or Entry of Judgment — Security — Extension of Time — Order of Judge—Vacation—R. S. C. c. 135, ss. 40, 42, 46.

On the trial of an action the plaintiffs obtained a verdict which the Divisional Court set aside, the Court of Appeal allowed an appeal, and restored the judgment at the trial, reducing the amount of damages by a certain specified sum.

Held, that nothing substantial remained to be settled by the minutes on entering the formal judgment of the Court of Appeal, and the time for appealing therefrom to the Supreme Court ran from the pronouncing and not from the entry of such judgment. *O'Sullivan* v. *Harty* (13 Can. S. C. R. 431); *Walmsley* v. *Griffith* (13 Can. S. C. R. 434; *Martley* v. *Carson* (13 Can. S. C. R. 439) followed.

By sec. 42 of the Supreme and Exchequer Courts Act (R. S. C. c. 135), a court proposed to be appealed from, or a judge thereof may allow an appeal after the time prescribed therefor by sec. 40 has expired, but an order by the court below or a judge thereof, extending the time, will not authorize the Supreme Court or a judge thereof to accept security after the 60 days have elapsed.

The sixty days for appealing to the Supreme Court prescribed by sec. 40 of the Act, is not suspended during the vacation of that court established by its rules.

The News Printing Co. v. *Macrae et al*, xxvi., 695

50. — Time Limit — Commencement of — Pronouncing or Entry of Judgment —Security—Extension of Time—R. S. C. c. 135, ss. 40, 42, 46.

On the trial of an action to set aside a chattel mortgage, the plaintiff obtained a declaration that the mortgage was void, and an order setting it aside without costs. The decision was reversed on appeal, and the action dismissed with costs, both in the Court of Appeal and in the court below, by a judgment pronounced on the seventh of November, 1895. The minutes had not been settled until some days afterwards, and at the time of the settlement the draft minutes were altered by the Registrar of the Court of Appeal by refusing costs to one of the respondents, and also by changing a direction therein as to the payment over of funds on deposit abiding the decision of the suit. On an application made more than sixty days from the pronouncing of the judgment, for the approval of security under section 46 of the Supreme and Exchequer Courts Acts:

Held, that nothing substantial remained to be settled by the minutes so as to take the case out of the general rule that the time for appealing runs from the pronouncing of the judgment, and that the application was too late.

Martin v. *Sampson* .. .. .. xxvi., 707

51. — Jurisdiction — Expropriation of Lands—Assessments—Local Improvements — Future Rights — Title to Lands and Tenements—R. S. C. c. 135, s. 29 (*b*); 56 Vic., c. 29, s. 1 (D.).

A by-law was passed for the widening of a portion of a street up to a certain homologated line, and for the necessary expropriation therefor. Assessments for the expropriations for certain years having been made whereby proprietors of a part of the street were relieved from contributing any proportion of the cost, thereby increasing the burden of assessment on the properties actually assessed, the owners of these properties brought an action to set aside the assessments. The Court of Queen's Bench affirmed a judgment dismissing the action.

On an application for leave to appeal:

Held, that as the effect of the judgment sought to be appealed from would be to increase the burden of assessment not only for the expropriations then made, but also for expropriations which would have to be made in the future, the judgment was one from which an appeal would lie, the matter in controversy coming within the meaning of the words "and other matters or things where the rights in future might be bound," contained in sub-sec. (*b*) of sec. 29, Supreme and Exchequer Courts Act, as amended by 56 Vic. c. 29, s. 1.

Stevenson v. *The City of Montreal*, xxvii., 187

52. — Interlocutory Order — Trial by Jury—Final Judgment.

A judgment of the Court of Queen's Bench for Lower Canada, affirmed a judgment of the Superior Court, by which the defendant's application to have the issues tried by a jury under the provisions of Arts. 348-350 C. C. P., was refused. The defendant took an appeal to the Supreme Court of Canada, whereupon the plaintiff moved to quash;

Held, that the decision complained of was an interlocutory judgment only, and that no appeal could lie under the provisions of "The Supreme and Exchequer Courts Act," and amendments thereto. (The appeal was quashed with costs).

Demers v. *The Bank of Montreal*, 26th February, 1897 .. .. xxvii., 197

53.—Action en bornage—Future Rights —Title to Lands—R. S. C. c. 135, s. 29 (*b*)—54 & 55 Vic. c. 25, s. 3 (D.)—56 Vic., c. 29, s. 1 (D.).

The parties executed a deed for the purpose of settling the boundary between contiguous lands, of which they were respectively proprietors, and thereby named a provincial surveyor as their referee to run the line. The line thus run being disputed, M. brought an action to have this line declared the true boundary, and to revendicate a disputed strip of land lying upon his side of the line so run by the surveyor.

Held, that under R. S. C., c. 135, s. 29, s.-s. (*b*), as amended by 56 V. c. 29, s. 1 (D.), an appeal would lie to the Supreme Court of Canada, first, on the ground that the question involved was one relating to a title to

lands, and secondly, on the ground that it involved matters or things where rights in future might be bound. *Chamberland* v. *Fortier* (23 Can. S. C. R., 371) referred to and approved.

McGoey v. *Leamey* .. .. .. xxvii., 193

54. — Appeal — Election Petition — Preliminary Objection—Delay in Filing —Objections Struck out—Order in Chambers—R. S. C. c. 8, s. 50.

The Supreme Court refused to entertain an appeal from the decision of a Judge in Chambers granting a motion to have preliminary objections to an election petition struct out for not being filed in time. Such decision was not one on preliminary objections within s. 50 of the Controverted Elections Act, and if it were no judgment on the motion could put an end to the petition.

West Assiniboia Election Case .. xxvii., 215

55.—Appeal—Preliminary Objections—R. S. C. c. 9, ss. 12 and 50—Order Dismissing Petition—Affidavit of Petitioner.

The appeal given to the Supreme Court of Canada by The Controverted Elections Act (R. S. C. c. 9, s. 50), from a decision on preliminary objections to an election petition can only be taken in respect to objections filed under sec. 12 of the Act. No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue.

Marquette Election Case .. .. xxvii., 219

56.—Questions of Practice—Duty of Appellate Court.

The Supreme Court of Canada will take into consideration questions of practice when they involve substantial rights, or the decision appealed from may cause grave injustice.

Part of lands seized by the sheriff had been withdrawn before sale, but on proceedings for *folle enchére* it was ordered that the property described in the *procès verbal* of seizure should be resold, no reference being made to the part withdrawn. On appeal, the Court of Queen's Bench reversed the order on the ground that it directed a resale of property which had not been sold, and further, because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for resale, or prior to the proceedings for *folle enchére*.

Held, that the Court of Queen's Bench should not have set aside the order, but should have reformed it by rectifying the error.

Lambe v. *Armstrong* .. .. .. xxvii., 309

57.—Court of Review—Appeal to Privy Council—Appealable Amount— 54 & 55 Vic., c. 25, s. 3. ss. 3 and 4 (D.) —C. S. L. C. c. 77, s. 25—Arts. 1115, 1178 C. C. P.—R. S. Q. Art. 2311.

In appeals to the Supreme Court of Canada from the Court of Review (which, by 54 & 55 Vict. c. 25, s. 3, s.-s.3, must be appealable to the Judicial Committee of the Privy Council), the amount by which the right of appeal is to be determined is that demanded, and not that recovered, if they are different. *Dufresne* v. *Guévremont* (26 Can. S. C. R. 216) followed.

Citizens Light and Power Co. v. *Parent*, xxvii., 316

58.—Jurisdiction—Appealable Amount—Future Rights—"Other Matters and Things"—R. S. C. c. 135, s. 29 (*b*)—56 Vic., c. 29 (D.).

The classes of matters which are made appealable to the Supreme Court of Canada under the provisions of section 29, sub-sec. (*b*) of "The Supreme and Exchequer Courts Act," as amended by 56 Vict. cap. 29, do not include future rights, and do not affect rights to or in real property, or rights analogous to interests in real property. *Rodier* v. *Lapierre* (21 Can. S. C. R. 69), and *O'Dell* v. *Gregory* (24 Can. S. C. R. 661) followed.

Raphael v. *Maclaren* .. .. .. xxvii., 319

59.—Evidence Taken by Commission—Reversal on Questions of Fact.

Where the witnesses have not been heard in the presence of the judge, but their depositions were taken before a commissioner, a Court of Appeal may deal with the evidence more fully than if the trial judge had heard it or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it.

Malzard v. *Hart* .. .. xxvii., 510

60.—Appeal—Collocation and Distribution—Arts. 761, 20 & 144 C. C. P.—Action to Annul Deed—Parties in Interest—Incidental Proceedings.

The appeal from judgments of distribution under article 761 of the Code of Civil Procedure is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.

The provision of article 144 of the Code of Civil Procedure that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench.

Guertin v. *Gosselin* .. .. .. xxvii., 514

61.—Questions of Fact — Second Appellate Court.

Where a judgment upon questions of fact rendered in a court of first instance has been reversed upon a first appeal, a second Court of Appeal should not interfere to restore the original judgment, unless it clearly appears that the reversal was erroneous.

Demers v. *Montreal Steam Laundry Co.*, xxvii., 537

62.—Jurisdiction—Title to Lands—Municipal Law — By-law — Widening Streets—Expropriation—R. S. C. c. 135, s. 29 (*b*)—54 & 55 Vic. c. 25, s. 3—56 Vic., c. 29, s. 1.

In an action to quash a by-law passed for the expropriations of land, the controversy relates to a title to lands, and an appeal lies to the Supreme Court of Canada, although the amount in controversy is less than $2,000.

The judgment on the merits dismissed the appeal for the reasons stated in the judgment of the court below. (See Q. R. 6 Q. B. 345).

Murray v. *Westmount* .. .. .. xxvii., 579

63.—Jurisdiction—Judgment — Reference to Court for Opinion—54 Vic., c. 5 (B. C.)—R. S. C. c. 135, ss. 24 and 28.

The Supreme Court of Canada has no jurisdiction to entertain an appeal from the opinion of a provincial court upon a reference made by the Lieutenant-Governor in Council, under a provincial statute, authorizing him to refer to the court for hearing and consideration any matter which he may think fit, although the statute provides that such opinion shall be deemed a judgment of the court.

Union Colliery Company of British Columbia v. *The Attorney-General of British Columbia and others* .. .. xxvii., 637

64.—Jurisdiction—52 Vic., c. 37, s. 2 (D.)—Appointment of Presiding Officers—County Court Judges—55 Vic., c. 48 (Ont.)—58 Vic. c. 47 (Ont.)—Construction of Statute — Appeal from Assessment—Final Judgment.

By 52 Vic. c. 37, s. 2, amending "The Supreme and Exchequer Courts Act," an appeal lies in certain cases to the Supreme Court of Canada from courts "of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority." By the Ontario Act, 55 Vic. c. 48, as amended by 58 Vic. c. 47, an appeal lies from rulings of Municipal Courts of Revision in matters of assessment to the County Court Judges of the County Court District where the property has been assessed. On an appeal from a decision of the County Court Judges under the Ontario statutes:

Held, King, J., dissenting, that if the County Court Judges constituted a "court of last resort" within the meaning of 52 Vic. c. 37, s. 2, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act.

Held, per Gwynne, J., that as no binding effect is given to the decision of the County Court Judges, under the Ontario Acts cited, the court appealed from was not a "court of last resort" within the meaning of 52 Vic. c. 37, s. 2.

Quære.—Is the decision of the County Court Judges a "final judgment" within the meaning of 52 Vic. c. 37, s. 2?

The City of Toronto v. *The Toronto Railway Co.* .. .. xxvii., 640

65.—Jurisdiction—Final Judgment—Discretionary Order—Default to Plead — R. S. C. c. 135, ss. 24 (*a*), 27 — R. S. O. c. 44, s. 46—Ontario Judicature Act, Rule 796.

After judgment has been entered by default in an action in the High Court of Justice it is in the discretion of a Master in Chambers to grant or refuse an application by the defendant to have the proceedings reopened to allow him to defend, and an appeal to the Supreme Court from the decision of the court of last resort on such an application is prohibited by sec. 27 of "The Supreme and Exchequer Courts Acts.'

Quære.—Is the judgment on such application a "final judgment" within the meaning of sec. 24 (*a*) of the Act?

O'Donohue v. *Bourne* .. .. .. xxvii., 654

66.—Habeas Corpus—Change in Position of Parties Pending Appeal.

Upon the calling for hearing of the appeal (which was from a judgment of the Supreme Court of British Columbia, refusing a writ of Habeas Corpus. for the possession of Quai

Sing, a Chinese female under age), counsel for the respondent produced to the Court an order of the Supreme Court of British Columbia, dated subsequently to the judgment appealed from, by which it appeared that the respondent, the matron of a rescue home, had been appointed by that court as guardian to the infant in question, whereupon the Chief Justice intimated that, under the circumstances, it was useless to proceed with the hearing of the appeal, it being impossible that any order could be made thereon respecting the possession of the infant being given to the appellant.

The appeal was consequently dismissed with costs.

Seid Sino Kaw v. *Bowes*, 17th May, 1898.

67.—Appeal—Dismissal for want of Appearance — Application to Reinstate—Notice—Practice—Costs.

The appeal had been regularly inscribed on the roll for hearing at the May sittings of the Supreme Court of Canada, and on 18th May, 1898, the case being called in the order in which it appeared upon the roll, no person appeared on behalf of the appellant. Counsel appeared for the respondent and asked that the appeal should be dismissed for want of prosecution. The Court referred to the fact that the case had been called in its proper place on the roll on the previous day and allowed to stand over because counsel were not present on the part of the appellant, and the appeal was dismissed with costs.

On 20th May, 1898, application by motion was made on behalf of the appellant to have the appeal reinstated and restored to its place on the roll for hearing on such terms as the Court might deem appropriate, the ground stated for requesting such indulgence being that counsel for the appellant were under a misapprehension as to the time when the hearing was to take place. The motion was opposed by counsel for the respondent, who objected that proper notice of the motion had not been given as required by the rules of practice.

The Court refused to hear the motion or to make an order staying the issue of the certificate of the judgment already rendered dismissing the appeal, but, under the circumstances, the motion was dismissed without costs.

The Hall Mines (Limited), v. *Moore*, 20th May, 1898.

68.—Jurisdiction—Title to Land—Petitory Action — Encroachment — Constructions under Mistake of Title—Good Faith—Common Error—Demolition of Works—Right of Accession—Indemnity—Res judicata—Arts. 412, 413, 429 *et seq.*, 1047, 1241 C. C.

An action to revendicate a strip of land upon which an encroachment was admitted to have taken place, by the erection of a building extending beyond the boundary line, and for the demolition and removal of the walls, and the eviction of the defendant, involves questions relating to a title to land, independently of the controversy as to bare ownership, and is appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Act.

Delorme v. *Cusson* .. .. xxviii., 66

69.—Questions of Fact—Reversal in Court of Appeal.

The Supreme Court of Canada will take questions of fact into consideration on appeal, and if it clearly appears that there has been an error in the admission or appreciation of evidence by the courts below, their decisions may be reversed or varied. *The North British and Mercantile Insurance Company* v. *Tourville* (25 Can. S. C. R. 177) followed.

Lefeunteum v. *Beaudoin* .. .. xxviii., 89

70.—Action — Jurisdiction — Appealable Amount — Monthly Allowance — Future Rights—"Other Matters and Things"—R. S. C. c. 135, s. 29 (*b*)—56 Vic., c. 29 (D.)—Established Jurisprudence in Court Appealed from.

In an action *en declaration de paternité* the plaintiff claimed an allowance of $15 per month until the child (then a minor aged four years and nine months), should attain the age of ten years, and for an allowance of $20 per month thereafter "until such time as the child should be able to support and provide for himself." The court below, following the decision in *Lizotte* v. *Descheneau* (6 Legal News, 107), held that under ordinary circumstances such an allowance would cease at the age of fourteen years.

Held, that the *demande* must be understood to be for allowances only up to the time the child should attain the age of fourteen years and no further, so that, apart from the contingent character of the claim the *demande* was for less than the sum or value of two thousand dollars, and consequently the case was not appealable under the provisions of the twenty-ninth section of "The Supreme and Exchequer Courts Act," even if an amount or value of more than two thousand dollars might become involved under certain contingencies as a consequence of the judgment of the court below. *Rodier* v. *Lapierre* (21 Can. S. C R. 69), followed.

Held also, that the nature of the action and *demande* did not bring the case within the exception as to "future rights" mentioned in the section of the act above referred to. *O'Dell* v. *Gregory* (24 Can. S. C. R. 661); *Raphael* v. *Maclaren* (27 Can. S. C. R. 319) followed.

Macdonald v. *Galivan* .. .. xxviii., 258

71.—JURISDICTION—AMOUNT IN CONTROVERSY—AFFIDAVITS—CONFLICTING AS TO AMOUNT—THE EXCHEQUER COURT ACTS 50 & 51 VIC., C. 16, SS. 51-53 (D.)—54 & 55 VIC., C. 26, S. 8 (D.)—THE PATENT ACT—R. S. C. C. 61, S. 36.

On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the Appellate Court, and affidavits were also filed by the appellants, showing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion.

Dreschel et al v. *Auer Incandescent Light Mfg. Co.* .. .. xxviii., 268

72.—JURISDICTION—54 & 55 VIC., C. 25, S. 2—PROHIBITION — RAILWAYS — EXPROPRIATION—ARBITRATION.

The provisions of the second section of the statute, 54 & 55 Vic. c. 25, giving the Supreme Court of Canada jurisdiction to hear appeals in matters of prohibition, apply to such appeals from the Province of Quebec as well as to all other parts of Canada.

Shannon v. *The Montreal Park and Island Railway Co.* .. .. xxviii., 374

73.—JURISDICTION — AMOUNT IN CONTROVERSY—OPPOSITION AFIN DE DISTRAIRE—JUDICIAL PROCEEDING — DEMAND IN ORIGINAL ACTION—R. S. C. C. 135, S. 29.

An opposition *afin de distraire*, for the withdrawal of goods from seizure, is a "judicial proceeding" within the meaning of the twenty-ninth section of "The Supreme and Exchequer Courts Act," and on an appeal to the Supreme Court of Canada, from a judgment dismissing such opposition, the amount in controversy is the value of the goods sought to be withdrawn from seizure, and not the amount demanded by the plaintiff's action, or for which the execution issued. *Turcotte* v. *Dansereau* (26 Can. S. C. R. 578), and *McCorkill* v. *Knight* (3 Can. S. C. R. 233; Cass. Dig. 2 ed. 694) followed; *Champoux* v. *Lapeirre* (Cass. Dig. 2 ed. 426), and *Gendron* v. *McDougall* (Cass. Dig. 2 ed. 429), discussed and distinguished.

King et al. v. *Dupuis dit Gilbert*, xxviii., 388

74.—JURISDICTION — FUTURE RIGHTS — ALIMENTARY ALLOWANCE—R. S. C. C. 135, SEC. 29, SS. 2; 54 & 55 VIC., C. 25, S. 3—56 VIC., C. 29, S. 2.

Actions or proceedings respecting disputes as to mere personal alimentary pensions or allowances do not constitute controversies wherein rights in future may be bound within the meaning of the second sub-section of the twenty-ninth section of "The Supreme and Exchequer Courts Act," as amended, which allows appeals to The Supreme Court of Canada from judgments rendered in the Province of Quebec in cases where the controversy relates to "annual rents or other matters or things where rights in future might be bound." (*Macfarlane* v. *Leclaire*, 15 Moo. P. C. 181, distinguished: *Sauvageau* v. *Gauthier*, L. R. 5 P. C. 494, followed).

La Banque du People v. *Trottier*, xxviii., 422

75.—ASSUMING JURISDICTION—AMOUNT IN CONTROVERSY—60 & 61 VIC., C. 34, S. 1 S.-S. (*c*).

Where the jurisdiction of the Supreme Court of Canada to entertain an appeal is doubtful, the Court may assume jurisdiction when it has been decided that the appeal on the merits must be dismissed. *Great Western Railway Company of Canada* v. *Braid* (1 Moo. P. C. N. S. 101), followed

By 60 & 61 Vic. c. 34, s. 1, s.-s. (*c*), no appeal lies from judgments of the Court of Appeal for Ontario unless the amount in controversy *in the appeal* exceeds $1,000, and by sub-sec. (*f*), in case of difference, it is the amount demanded, and not that recovered which determines the amount in controversy.

Held, per Taschereau, J., that to reconcile these two sub-sections, paragraph (*f*) should probably be read as if it meant the amount demanded upon the appeal. To read it as meaning the amount demanded in the action, which is the construction the Court has put upon R. S. C. c. 135, s. 29, relating to appeals from the Province of Quebec, would seem to be contrary to the intention of parliament. *Laberge* v. *The Equitable Life Assurance Society* (24 Can. S. C. R. 59) distinguished.

Bain v. *Anderson & Co., et al* .. xxviii., 481

76.—Special Leave—60 & 61 Vic. (D.), c. 34, s. 1 (*e*)—Benevolent Society—Certificate of Insurance.

An action in which less than the sum or value of one thousand dollars is in controversy, and wherein the decision involves questions as to the construction of the conditions indorsed upon a benevolent society's certificate of insurance, and as to the application of the statute securing the benefit of life insurance to wives and children to such certificates, is not a matter of such public importance as would justify an order by the court granting special leave to appeal under the provisions of sub-section (*e*) of the first section of the statute 60 & 61 Vic. c. 34.

Fisher v. *Fisher* .. .. xxviii., 494

77. — Jurisdiction — Matter in Controversy—Interest of Second Mortgagee —Surplus on Sale of Mortgaged Lands—60 & 61 Vic. c. 34, s. 1 (D.)—Statute. Construction of—Practice.

While an action to set aside a second mortgage on lands for $2,200 was pending, the mortgaged lands were sold under a prior mortgage, and the first mortgagee, after satisfying his own claims, paid the whole surplus of the proceeds of the sale amounting to $270 to the defendant as subsequent incumbrancer. Judgment was afterwards rendered declaring the second mortgage void, and ordering the defendant to pay to the plaintiff, as assignee for the benefit of creditors, the amount of $270 so received by him thereunder, and this judgment was affirmed on appeal. Upon an application to allow an appeal bond on further appeal to the Supreme Court of Canada, objections were taken for want of jurisdiction under the clauses of the Act 60 & 61 Vic. c. 34, but they were overruled by a Judge of the Court of Appeal for Ontario, who held that an interest in real estate was in question and the appeal was accordingly proceeded with, and the appeal case and factums printed and delivered.

On motion to quash for want of jurisdiction when the appeal was called for hearing:—

Held, that the case did not involve a question of title to real estate or any interest therein, but was merely a controversy in relation to an amount less than the sum or value of one thousand dollars, and that the Act 60 & 61 Vic. c. 34, prohibited an appeal to the Supreme Court of Canada.

Jermyn v. *Tew* .. .. xxviii., 497

78.—Discretion of Court Appealed from —Costs.

It is only when some fundamental principle of justice has been ignored, or some other gross error appears that the Supreme Court will interfere with the discretion of Provincial Courts in awarding or withholding costs.

Smith v. *The Saint John City Railway Company.*

The Consolidated Electric Company v. *The Atlantic Trust Company.*

The Consolidated Electric Company v. *Pratt* .. .. xxviii., 603

79.—Privy Council — Cross-appeal — Stay of Proceedings—Practice—Costs.

Where the respondent has taken an appeal, from the same judgment as is complained of in the appeal to the Supreme Court of Canada to the Judicial Committee of Her Majesty's Privy Council, the hearing of the appeal to the Supreme Court will be stayed until the Privy Council appeal has been decided, upon the respondent undertaking to proceed with diligence in the appeal so taken by him.

In the case in question the costs were ordered to be costs in the cause.

Eddy v. *Eddy*, 4th October, 1898.

80.—Jurisdiction—Judgment in Court of Review—Judgment in First Instance Varied—Art. 43 C. P. Q.—54 & 55 Vic., c. 25, s. 3, ss. 3—Construction of Statute.

Where the Superior Court, sitting in Review, has varied a judgment, on appeal from the Superior Court, by increasing the amount of damages, the judgment rendered in the court of first instance is not thereby confirmed, and consequently there cannot be an appeal direct from the judgment of the Court of Review to the Supreme Court of Canada under the provisions of the third sub-section of section three, chap. 25 of the statutes of 54 & 55 Vic. (D.), amending the Supreme and Exchequer Courts Act.

Simpson et al v. *Palliser*, 10th October, 1898, xxix.

81.—Jurisdiction — Criminal Law — The Criminal Code, 1892, secs. 742-750—New Trial—Statute, Construction of —55 & 56 Vic., c. 29, s. 742.

An appeal to the Supreme Court of Canada does not lie in cases where a new trial has been granted by the Court of Appeal, under the provisions of the Criminal Code, 1892, sections 742 to 750 inclusively.

The word "opinion" as used in the second sub-section of section seven hundred and forty-two of "The Criminal Code, 1892," must be construed as meaning a "decision" or "judgment" of the Court of Appeal in criminal cases.

Viau v. *The Queen*, 13th October, 1898, xxix.

82.—Right to Appeal in Ontario Cases—60 & 61 Vic., c. 34—Application to Pending Cases.

The Act 60 & 61 Vic. c. 34, which restricts the right of appeal to the Supreme Court in cases from Ontario, as therein specified, does not apply to a case in which the action was pending when the Act came into force, although the judgment directly appealed from may not have been pronounced until afterwards.

Hyde v. *Lindsay*, 2nd November, 1898, xxix.

84.—Question of Local Practice—Inscription for Proof and Hearing—Peremptory List — Notice — Requete Civile.

Where a grave injustice has been inflicted upon a party to a suit, the Supreme Court of Canada will interfere for the purpose of granting relief, although the question involved upon the appeal may be one of mere local practice only. *Lambe* v. *Armstrong* (27 Can. S. C. R. 390), followed.

Under a local practice prevailing in the Superior Court in the District of Montreal, the plaintiff obtained an order from a judge fixing a day peremptorily for the adduction of evidence, and hearing on the merits of a case by precedence over other cases previously inscribed on the roll, and without notice to the defendant. The defendant did not appeal, and judgment by default was entered in favour of the plaintiff.

Held, reversing the judgments of both courts below, upon the defendant's *requête civile*, that the order was improperly made for want of notice to the adverse party, as required by the rules of practice of the Superior Court.

The Eastern Townships Bank v. *Swan et al*, 21st November, 1898 .. .. xxix.

84.—Election Petition—Dissolution of Parliament—Abatement of Proceedings—Return of Deposits—Payment out of Court Below—Practice.

See Election Law. 1.

85. — Finding of Jury — Interference with—Question of Fact.

See Master and Servant, 1.

86.—Questions of Fact—Unsatisfactory Findings of Jury—Interference with—Second Appellate Court.

See Negligence, 6.

87.—Award—Questions of Fact.

See Arbitration, 1.

88.—Dismissal for Non-appearance at Hearing—Application to Restore.

See Practice, 28.

89.—Disqualification of Judge—Quorum in such Case—Resignation of Judge—Re-hearing of Appeal.

See Quorum.

90.—Question of Fact—Warranty—Defect in Construction—Satisfaction by Acceptance and User—Variation from Design—Demurrage—Evidence—Onus of Proof—Expert Testimony—Concurrent Findings.

See Evidence, 15.

91.—Questions of Fact—Evidence—Burden of Proof—Railway Company—Negligence — Damages by Fire — Sparks from Engine or "Hot-box"—C. C. Art. 1053.

See Evidence, 18.

92.—Matters of Fact—Evidence.

See Contract, 34.

93. — Acquiescence by Appellant in Judgment—Costs.

See Heirs, 1.

94.—Evidence—Improper Principle of Appreciation — Duty of Appellate Court—Findings of Fact—Estimating Damages.

See Arbitration, 6.

95.—Negligence—Master and Servant—Employer's Liability — Concurrent Findings of Fact — Contributory Negligence — Duty of Appellate Court.

See Negligence, 34.

APPROPRIATION OF PAYMENTS.

1.—Debtor and Creditor—Payment by Debtor —Appropriation—Preference —R. S. O. (1887) c. 124.

A trader carrying on business in two establishments mortgaged both stocks in trade

to B. as security for indorsements on a composition with his creditors, and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B., who received, out of the proceeds of the sale of the goods under an order of the court, the balance remaining due on his mortgage. *Horsfall* v. *Boisseau* (21 Ont. App. R. 663). The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt, which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors.

Held, affirming the decision of the Court of Appeal, that there was no preference to B. within R. S. O. (1887) c. 124, s. 2; that his position was the same as if his whole debt secured and unsecured had been overdue, and there had been one sale of both stocks of goods, realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt, under sec. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off.

Stephens v. *Boisseau* .. .. .. xxvi., 437

2. — Suretyship — Continuing Security — Imputation of Payments—Reference to take Account.

See Principal and Surety, 1.

3.— Proportionate Ratio — Suretyship — Assignment by Vendee—Giving Time —Arrears of Interest—Release of Lands.

See Principal and Surety, 3.

4.—Debtor and Creditor—Security for Debt—Security Realized by Creditor—Appropriation of Proceeds—Res Judicata.

See Debtor and Creditor, 10.

ARBITRATION.

1.—Award—Appeal—Questions of Fact —Second Award—Arbitrator Functus Officio.

S. and P. were engaged in business together, under a written agreement, in the packing and selling of fruit, and a dispute having arisen as to the state of accounts between them, a third person was chosen to enable them to effect a settlement. S. claimed that the person so chosen was only to go over the accounts and make a statement, which P. contended that the whole matter was left to him as an arbitrator. This person, having gone over the accounts, made out a statement shewing $235 to be due to S., and some time afterwards he presented a second statement shewing the amount due to be $286. S. was given a cheque for the latter amount, which, he asserted, was taken only on account, and he afterwards brought an action for the winding-up of the partnership affairs.

Held, affirming the decision of the Court of Appeal for Ontario, that whether or not there was a submission to arbitration was a question of fact as to which the Supreme Court of Canada would not, on appeal, interfere with the finding of the trial judge that all matters were submitted, affirmed as it was, by a Divisional Court and the Court of Appeal.

Held, further, that there was a valid award for $235; that having made his award for that amount, the arbitrator was *functus officio*, and that the second award was a nullity; and that the Divisional Court was wrong in holding that, as P. relied only upon the second award, the judgment should be against him on the case as claimed by S.

Snetsinger v. *Peterson*, 23rd May, 1894.

2.—Expropriation—35 Vic., c. 32, s. 7 (Que.)—Interference with Award of Arbitrators.

In a matter of expropriation the decision of a majority of arbitrators, men of more than ordinary business experience, upon a question merely of value should not be interfered with on appeal.

Lemoine v. *City of Montreal.*

Allan v. *City of Montreal* .. .. xxiii., 390

3. — Agreement Respecting Lands — Boundaries — Referee's Decision — Bornage—Arts. 941-945 and 1341 *et seq.* C. C. P.

The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, thereby naming a third person to ascertain and fix the

true division line upon the ground, and agreeing further to abide by his decision, and accept the line which he might establish as correct. On the conclusion of the referee's operations one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary, and to revendicate the strip of land lying upon his side of it.

Held, reversing the judgment of the Court of Queen's Bench, that the agreement thus entered into was a contract binding upon the parties to be executed between them according to the terms therein expressed, and was not subject to the formalities prescribed by the Code of Civil Procedure relating to arbitrations.

McGoey v. *Leamy* .. .. xxvii., 545

4.—Municipal Corporation—Construction of Statute—55 Vic. c. 42, ss. 397, 404, 467, 473 (Ont.)—City Separated from County — Maintenance of Court House and Gaol—Care and Maintenance of Prisoners.

No compensation can be awarded by arbitrators to a County Council in respect of the use, by a city separated from that county, of the court house and gaol unless the question is specifically referred to them by a by-law of each municipality.

A claim for compensation for the care and maintenance of prisoners stands, as far as the meaning to be given to the word :" city " is concerned, upon the same basis as a claim for the use of the court house and gaol.

Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 409), affirmed.

County of Carleton v. *City of Ottawa*, 18th March, 1898 .. .. xxviii., 606

5.—Railways — Prohibition — Expropriation—Death of Arbitrator Pending Award—51 Vic. c. 29, ss. 156, 157—Lapse of Time for Making Award—Statute, Construction of—Art. 12 C. C.

In relation to the expropriation of lands for railway purposes, sections 156 and 157 of " The Railway Act," (51 Vic. c. 29, (D.), provide as follows:—" 156. A majority of the arbitrators at the first meeting after their appointment or the sole arbitrator, shall fix a day on or before which the award shall be made; and, if the same is not made on or before such day, or some other day to which the time for making it has been prolonged, either by consent of the parties or by resolution of the arbitrators, then the sum offered by the company as aforesaid, shall be the compensation to be paid by the company." " 157. If the sole arbitrator appointed by the judge, or any arbitrator appointed by the two arbitrators dies before the award has been made, or is disqualified, or refuses or fails to act within a reasonable time, then, in the case of the sole arbitrator, the judge, upon the application of either party, and upon being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, may appoint another arbitrator in the place of such sole arbitrator; and in the case of any arbitrator appointed by one of parties, the company and party respectively may each appoint and arbitrator in the place of its or his arbitrator so deceased, or not acting; and in the case of the third arbitrator appointed by the two arbitrators, the provisions of section one hundred and fifty-one shall apply; but no recommencement or repetition of the previous proceedings shall be required in any case. (Section 151 provides for the appointment of a third arbitrator either by the two arbitrators or by a judge).

Held, that the provisions of the 157th section apply to a case where the arbitrator appointed by the proprietor died before the award had been made, and four days prior to the date fixed for making the same; that in such a case the proprietor was entitled to be allowed a reasonable time for the appointment of another arbitrator to fill the vacancy thus caused, and to have the arbitration proceedings continued although the time so fixed had expired without any award having been made, or the time for the making thereof having been prolonged.

Shannon v. *The Montreal Park and Island Railway Company* .. .. xxviii., 374

6.—Railways—Eminent Domain — Expropriation of Lands—Evidence—Findings of Fact—Duty of Appellate Court—51 Vic. c. 29 (D.).

On an arbitration in a matter of the expropriation of land under the provisions of "The Railway Act," the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average of the different estimates made on behalf of both parties according to the evidence before them.

Held, reversing the decision of the Court of Queen's Bench, and restoring the judgment of the Superior Court (Taschereau and Girouard, JJ., dissenting), that the award was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded.

Grand Trunk Railway Co. of Canada v. *Coupal* .. .. xxviii., 531

7.—Award — Lessor and Lessee — Covenant in Lease—Breach—Payment of Compensation — Condition Precedent to Action.

See Lessor and Lessee, 1.

8. — Street Railway Co. — Agreement with Municipality—Repair of Roadway—Termination of Franchise.

See Contract, 6.

9.—Railway Expropriation—Award on—Additional Interest — Confirmation of Title—Railway Act, 1888, ss. 162, 170, 172.

See Expropriation, 1.

10.—Contract—Agreement for Arbitration in—Suspension of Right of Action.

See Contract, 7.

11.—Appeal from Award—Increase of Damages—Cross-appeal.

See Appeal, 39.

12.—Contract, Construction of—Inconsistent Conditions — Dismissal of Contractor — Architect's Powers — Arbitrator — Disqualification — Probable Bias—Rejection of Evidence —Judge's Discretion as to Order of Evidence.

See Contract, 24.

ARBITRATORS, DOMINION.

See Constitutional Law.

ARCHITECT.

1.—Contract, Construction of — Inconsistent Conditions—Dismissal of Contractor—Architect's Powers—Arbitrator — Disqualification—Probable Bias—Rejection of Evidence—Judge's Discretion as to Order of Evidence.

See Contract, 24.

2. — Contract — Public Work — Progress Estimates — Engineer's Certificate — Revision by Succeeding Engineer—Action for Payment on Monthly Certificate.

See Contract, 29.

ASSESSMENT.

1.—Ontario Assessment Act, R. S. O. (1887) c. 193, ss. 15, 65—Illegal Assessment —Court of Revision—Business Carried on in two Municipalities.

Section 65 of the Ontario Assessment Act (R. S. O. [1887] c. 193) does not enable the Court of Revision to make valid an assessment which the statute does not authorize.

Section 15 of the Act provides that "where any business is carried on by a person in a municipality in which he does not reside, or in two or more municipalities, the personal property belonging to such person shall be assessd in the municipality in which such personal property is situated."—W., residing and doing business in Brantford, had certain merchandise in London, stored in a public warehouse, used by other persons as well as W. He kept no clerk or agent in charge of such merchandise, but when sales were made a delivery order was given upon which the warehouse keeper acted. Once a week a commercial traveller for W., residing in London, attended there to take orders for goods, including the kind so stored, but the sales of stock in the warehouse were not confined to transactions entered into at London.

Held, affirming the decision of the Court of Appeal, that W. did not carry on business in London within the meaning of the said section, and his merchandise in the warehouse was not liable to be assessed at London.

The City of London v. *Watt* .. xxii., 300

2.—Assessment and Taxes—Tax on Railway — Nova Scotia Railway Act — Exemption—Mining Co.—Construction of Railway by—R. S. N. S. (5 Ser.) c. 53.

By R. S. N. S. (5 Ser.) c. 53, s. 9, s.-s. 30, the roadbed, etc., of all railway companies in the province is exempt from local taxation. By s. 1 the first part of the Act from s. 5 to 33 inclusive, applies to every railway constructed and in operation, or thereafter to be constructed under the authority of any Act of the Legislature, and by s. 4, part 2 applies to all railways constructed or to be constructed under the authority of any special Act, and to all companies incorporated for their construction and working. By s. 5, s.-s. 15, the expression "the company" in the Act means the company or party authorized by the special Act to construct the railway.

Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that part one of this Act applies to all railways constructed under provincial statutes and is not exclusive of those mentioned in part two; that a company incorporated by an Act of the Legislature as a mining company, with power "to construct and make such railroads and branch tracks as might be necessary for the transportation

of coals from the mines to the place of shipment, and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation of railways," and empowered by another Act (49 Vict. c. 45 [N. S.]) to hold and work the railway "for general traffic, and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines in accordance with and subject to the provisions of part second of cap. 53, R. S. N. S. (5 Ser.), entitled 'Of Railways,'" is a railway company within the meaning of the Act; and that the reference in 49 Vict. c. 145, s. 1, to part two does not prevent said railway from coming under the operation of the first part of the Act.

The International Coal Co. v. *The County of Cape Breton* .. .. xxii., 305

3.—Street Railway Co.—Repair of Roadway—Local Improvements—Termination of Franchise.

A Street Railway Company in Toronto was to be assessed in respect of repairs to the roadway traversed by the railway, as for local improvements, which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon owners or occupiers after they have ceased to be such.

Held, that after the termination of its franchise the company was not liable for these rates.

City of Toronto v. *Toronto Street Railway Co.*, xxiii., 198

4.—Street Railway Contract with Municipal Corporation—Taxes.

By a by-law of the City of Montreal a tax of $2.50 was imposed upon each working horse in the city. By sec. 16 of the Appellant's Charter it is stipulated that each car employed by the company shall be licensed and numbered, etc., for which the company shall pay "over and above all other taxes, the sum of $20 for each two-horse car, and $10 for each one-horse car."

Held, affirming the judgment of the Court below, that the company was liable for the tax of $2.50 on each and every one of its horses.

The Montreal Street Ry. Co. v. *The City of Montreal* .. .. xxiii., 259

5.—Drainage—Adjoining Municipalities—Finding Outlet—Petition.

In a drainage scheme for a single township, the work may be carried into a lower adjoining municipality for the purpose of finding an outlet without any petition from the owners of land in such adjoining township to be affected thereby, and such owners may be assessed for benefit. *Stephen* v. *McGillivray* (18 Ont. App. R. 516); and *Nissouri* v. *Dorchester* (14 O. R. 294), distinguished.

Township of Ellice v. *Hiles.*

Township of Ellice v. *Crooks* .. xxiii., 429

6.—Special Tax—Ex post facto Legislation—Warranty.

Assessment rolls were made by the City of Montreal under 27 & 28 Vic. c. 60 and 29 & 30 Vic. c. 56, apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside and the other was lost. The corporation obtained power from the legislature by two special Acts to make new rolls, but in the meantime the property in question had been sold and conveyed. New rolls were made assessing the lands for the same improvements, and the purchaser paid the taxes, and brought suit *en garantie* to recover the amount from the vendor.

Held, affirming the judgment of the courts below, Gwynne, J., dissenting, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the sale, were therefore the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had become owner of the lands, and that the vendor was not obliged by her warranty and declaration that taxes had been paid to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequent to the sale.

La Banque Ville Marie v. *Morrison*, xxv., 289

7.—Municipal By-law—Special Assessments—Drainage—Powers of Council as to Additional Necessary Works—Ultra vires Resolutions—Executed Contract.

Where a municipal by-law authorized the construction of a drain, benefiting lands in an adjoining municipality which was to pass under a railway, where it was apparent that a culvert to carry off the water brought down by the drain and prevent the flooding of adjacent lands would be an absolute necessity, the construction of such culvert was a matter within the provisions of sec. 573 of the Municipal Act (R. S. O. [1887] c. 184), and a new by-law authorizing it was not necessary. Taschereau, J., dissenting.

The Canadian Pacific Railway Co. v. *The Township of Chatham* .. .. .. xxv., 608

7. — Exemptions — Real Property — Chattels — Fixtures — Gas Pipes — Highway — Title to Portion — Legislative Grant of Soil—11 Vic. c. 14 (Can.)—55 Vic. c. 48 (O.)—"Ontario Assessment Act, 1892."

Gas pipes which are the property of a private corporation laid under the highways of a city, are real estate within the meaning of the "Ontario Assessment Act of 1892," and liable to assessment as such, as they do not fall within the exemptions mentioned in the sixth section of that Act.

The enactments effected by the first and thirteenth clauses of the company's Act of incorporation (11 Vic. c. 14), operated as a legislative grant to the company of so much of the land of the streets, squares and public places of the city as might be found necessary to be taken and held for the purposes of the company, and for the convenient use of the gas works, and when the openings where pipes may be laid are made at the places designated by the city surveyor, as provided in said charter, and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation.

The proper method of assessment of the pipes so laid and fixed in the soil of the streets, squares and public places in a city ought to be separately in the respective wards, of the city in which they may be actually laid, as in the case of real estate.

The Consumers Gas Co. of Toronto v. *City of Toronto* .. .. xxvii., 453

8.—Intermunicipal Drainage — Initiation and Contribution—By-law — Ontario Drainage Act of 1873—Ontario Consolidated Municipal Act, 1892.

The provision of the Ontario Municipal Act (55 Vic. c. 42, s. 590), that if a drain constructed in one municipality is used as an outlet, or will provide an outlet for the water of lands of another, the lands in the latter so benefited may be assessed for their proportion of the cost, applies only to drains properly so called, and does not include original watercourses which have been deepened or enlarged.

If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost, a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law

Broughton v. *Grey and Elma* .. xxvii., 495

9.—Collection of Taxes — Delivery of Roll—Statute—Directory or Imperative Provision—55 Vic. c. 48 (O.).

See Statute, 16.

10.—Repair of Streets — Pavements — Assessment on Property Owner—Double Taxation—24 Vic. c. 39 (N. S.) —53 Vic. c. 60, s. 14 (N. S.).

See Highway, 2.

11. — Municipal Corporation — By-law — Assessment — Local Improvement — Agreement with Owners of Property Construction of Subway—Benefit to Lands.

See Municipal Corporation, 28.

12.—Municipal Corporation — Highway — Private way — Widening Street — Local Improvement—Special Assessment.

See Res Judicata, 10.

13.—Appeal—Expropriation of Lands—Local Improvements—Future Rights.

See Appeal, 51.

14.—Appeal—Jurisdiction—52 Vic. c. 37, s. 2 (D.)—Appointment of Presiding Officers—County Court Judges—55 Vic. c. 48 (Ont.)—57 Vic. c. 51, s. 5 (Ont.)—58 Vic. c. 47 (Ont.)—Constuction of Statute—Appeal from Assessment — Final Judgment — "Court of Last Resort."

See Appeal, 64.

15.—Drainage—Extra Cost of Works—Repairs—Misapplication of Funds—Intermunicipal Works—Negligence—Damages —By-law—Re-assessment—R. S. O. (1877) c. 174—46 Vic. c. 18 (Ont.).

See Watercourses.

ASSIGNEE.

1.—Insurance Against Fire—Condition of Policy — Fraudulent Statement — Proof of Fraud — Presentation — Assignment of Policy — Fraud by Assignor.

See Insurance Fire, 5.

2.—Assignment for the Benefit of Creditors — Preferred Creditors — Money paid under voidable Assignment—Liability of Assignee—Statute of Elizabeth—Hindering and Delaying Creditors.

See Assignment, 3.

ASSIGNMENT.

1.—For Benefit of Creditors—Preferences—R. S. N. S. c. 92, ss. 4, 5, 10—Chattel Mortgage—Statute of Eliz.—Fraud.

Though an assignment contains preferences in favour of certain creditors, yet if it includes, subject to such preferences, a trust in favour of all the assignor's creditors it is "an assignment for the general benefit of creditors" under section 10 of the Nova Scotia Bills of Sale Act (R. S. N. S. c. 92), and does not require an affidavit of *bona fides*. *Durkee* v. *Flint* (19 N. S. Rep. 487), approved and followed; *Archibald* v. *Hubley* (18 Can. S. C. R. 116), distinguished.

A provision in an assignment for the security and indemnity of makers and indorsers of paper not due, for accomodation of the debtor, does not make it a chattel mortgage under sec. 5 of the Act, the property not being redeemable and the assignor retaining no interest in it.

An assignment is void under the statute of Elizabeth as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member, and provides for allowance of interest on a claim of the said firm until paid, and the assignee is permitted to continue in the same possession and control of the business as he previously had, though no one of these provisions taken by itself would have such effect.

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

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

Kirk v. *Chisholm* .. .. xxvi., 111

2.—Debtor and Creditor—Payment by Debtor—Appropriation —Preference —R. S. O. (1887), c. 124.

A trader carrying on business in two establishments, mortgaged both stocks in trade to B. as security for indorsements on a composition with his creditors, and for advances in cash and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances, and a portion of overdue notes, and there were some notes not matured and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under the execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B., who received, out of the proceeds of the sale of the goods, under an order of the court, the balance remaining due on his mortgage. *Horsfall* v. *Boisseau* (21 Ont. App. R. 663). The assignee of the mortgagor then brought an action against C. to recover the amount representing the unsecured part of his debt, which was paid by the purchase of the first stock, which, payment was alleged to be a preference to B. over the other creditors.

Held, affirming the decision of the Court of Appeal, that there was no preference to B. within R. S. O. [1887] c. 124, s. 2; that his position was the same as if his whole debt secured and unsecured had been overdue, and there had been one sale of both stocks of goods realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under sec. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off.

Stephens v. *Boisseau* .. .. .. xxvi., 437

3.—Assignment for Benefit of Creditors —Preferred Creditors—Moneys Paid under Voidable Assignment — Liability of Assignee — Statute of Elizabeth — Hindering and Delaying Creditors.

In an action to have a deed of assignment for the benefit of creditors set aside by creditors of the assignor, on the ground that it is void under the statute of Elizabeth, neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor, or persons claiming under him can

be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them. *Cox* v. *Worrall* (26 N. S. Rep. 366), questioned.

Taylor v. *Cummings* .. .. .. xxvii., 589

4.—Right of Action—Conveyance Subject to Mortgage—Obligation to Indemnify—Assignment of—Principal and Surety—Implied Contract.

The obligation of a purchaser of mortgaged lands to indemnify his grantor against the personal covenant for payment may be assigned even before the institution of an action for the recovery of the mortgage debt, and, if assigned to a person entitled to recover the debt, it gives the assignee a direct right of action against the person liable to pay the same.

Maloney v. *Campbell* .. .. .. xxviii., 228

5.—Banking—Collateral Security—R. S. C. c. 120, Schedule "C"—53 Vic. c. 31, ss. 74, 75—Renewals.

An assignment made in the form "C" to the "Bank Act" as security for a bill or note given in renewal of a past due bill or note is not valid as a security under the seventy-fourth section of the "Bank Act." The judgment of the Court of Appeal for Ontario (24 Ont. App. R. 152), affirmed.

Bank of Hamilton v. *Halstead* .. xxviii., 235

6.—Assignment in Trust for Creditors—Prior Chattel Mortgage—Possession of Goods—Delivery.

See Chattel Mortgage, 2.

7.—Assignment for Benefit of Creditors—Judicial Abandonment—Subrogation—Confusion of Rights—Compensation—Arts. 772 and 778, C. C. P.—Composition and Discharge.

See Abandonment, 1.

See Partnership, 5.

8.—Chattel Mortgage — Mortgagee in Possession—Negligence—Wilful Default — Sale Under Powers — "Slaughter Sale"—Practice—Revocation of Assignment.

See Sale, 4.

9.—Mortgage—Loan to Pay off Prior Encumbrance—Interest—Assignment of Mortgage—Purchase of Equity of Redemption—Accounts.

See Mortgage, 8.

10.—Assignment of Debt—Confidential Relations — Knowledge of Bookkeeper.

See Principal and Agent, 5.

11.—Expected Profits—Statute of Elizabeth—Assets Exigible in Execution—Pressure.

See Fraudulent Preferences, 3.

12. — Mortgage — Leasehold Premises — Terms of Mortgage—Assignment or Sublease.

See Mortgage, 9.

13.—Insolvency—Preference—Payment in Money—Cheque of Third Party—R. S. O. c. 124, s. 3.

See Fraudulent Preferences, 4.

AWARD.

1.—By Drainage Referee—54 Vic., c. 51 (Ont.)—Appeal—Jurisdiction—R. S. C. c. 135, s. 24—Costs.

See Appeal, 32.

2.—Prohibition — Railways — Expropriation—Arbitration—Death of Arbitrator Pending Award—51 Vic. c. 29, ss. 156, 157—Lapse of Time for Making Award—Construction of Statute—Art. 12 C. C.—Appeal—Jurisdiction—54 & 55 Vic. c. 25, s. 2.

See Arbitration, 5.

BAILIFF.

Election Petition—Preliminary Objections—Service of Petition—Bailiff's Return—Cross-examination —Production of Copy—Arts. 56 & 78 C. C. P.

A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member is a sufficient return. It need not state by whom the copies were certified.

Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence.

Beauharnois Election Case .. .. xxvii., 232

BAILMENT.

1.— Fraudulent Appropriation — Unlawful Receiving—Simultaneous Acts.

See Criminal Law, 2.

2.—Common Carriers—Express Company—Receipt for Money Parcel—Conditions Precedent—Notice of Claim—Pleading — Money Counts — Special Pleas.

See Carriers, 2.

3.—Carrier—Shipping—Chartered Ship—Perishable Goods—Excepted Perils—Transhipment—Obligation to Tranship—Repairs—Reasonable Time.

See Carriers, 3.

4.—Construction of Contract — Agreement to Secure Advances—Sale—Pledge — Delivery of Possession — Arts. 434, 1025, 1026, 1027, 1472, 1474, 1492, 1994*c*, C. C. — Bailment to Manufacturer.

See Contract, 39.

BANKING.

1.—"Letters of Credit"—Negotiable Instrument—"Bills of Exchange Act, 1890"—"The Bank Act"—Powers of Executive Councillors—Ratification by Legislature.

A bank cannot deal in such securities as a "letter of credit" signed by an Executive Councillor, without the authority of an order in council, which is dependent upon the vote of the Legislature, and therefore not a negotiable instrument within the Bills of Exchange Act, 1890, or The Bank Act, R. S. C. c. 120, ss. 45 and 60.

The Jacques Cartier Bank v. *The Queen*, xxv., 84

2. — Principal and Agent — Agent's Authority—Representation by Agent—Principal Affected by—Advantage to Other Than Principal—Knowledge of Agent—Constructive Notice.

Where an agent does an act outside of the apparent scope of his authority, and makes a representation to the person with whom he acts to advance the private ends of himself or some one else other than his principal, such representation cannot be called that of the principal.

In such a case it is immaterial whether or not the person to whom the representation was made believed the agent had authority to make it.

The local manager of a bank having received a draft to be accepted, induced the drawee to accept by representing that certain goods of his own were held by the bank as security for the draft.

In an action on the draft against the acceptor:

Held, affirming the decision of the Supreme Court of New Brunswick, that the bank was not bound by such representation; that by taking the benefit of the acceptance it could not be said to adopt what the manager said in procuring it, which would burden it with responsibility instead of conferring a benefit; and that the knowledge of the manager with which the bank would be affected should be confined to knowledge of what was material to the transaction and the duty of the manager to make known to the bank.

Richards v. *The Bank of Nova Scotia*, xxvi., 381

3.— Company — Bills of Exchange and Promissory Notes—Discount by President—Credit to Company's Account—Payments out to Company's Creditors—Liability of Company upon Note given without Authority — Bona Fides.

Where the president of an incorporated company made a promissory note in the company's name without authority, and discounted it with the company's bankers, the proceeds being credited to the company's account and paid out by cheques in the company's name to its creditors' whose claims should have been paid by the president out of funds which he had previously misappropriated, the bankers, who had taken the note in good faith are entitled to charge the amount thereof at maturity against the company's account.

Judgment of the Court of Appeal for Ontario (23 Ont. App. R. 66), affirmed.

The Bridgewater Cheese Factory Co. v. *Murphy*, 21st May, 1896 .. .. .. xxvi., 443

4.—Debtor and Creditor—Security for Debt—Security Realized by Creditor — Appropriation of Proceeds — Res Judicata—Practice.

If a bank agrees to give a customer a line of credit, accepting negotiable paper as collateral security, it is not obliged, so long as the paper remains uncollected, to give any credit in respect of it, but when any portion of the collaterals is paid it operates at once, as payment of the customer's debt and must be credited to him.

Under the Judicature Act, estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded.

Cooper et al. v. *Molsons Bank* .. xxvi., 611

(Affirmed in Privy Council, 9th March, 1898).

5.—Winding-up Act—Moneys Paid out of Court—Order Made by Inadvertence—Jurisdiction to Compel Repayment—R. S. C. c. 129, ss. 40, 41, 94—Locus Standi of Receiver-General—55 & 56 Vic. c. 28, s. 2—Construction of Statute.

The liquidators of an insolvent bank passed their final accounts and paid a balance, remaining in their hands, into court. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General for Canada, as trustee of the residue, intervened, and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act.

Held, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene, although the three years from the date of the deposit mentioned in the Winding-up Act had not expired.

Held, also, that even if he was not so entitled to intervene, the provincial courts had jurisdiction to compel repayment into court of the moneys improperly paid out.

Hogaboom v. *The Receiver-General of Canada*; *In re Central Bank of Canada* .. xxviii., 192

6.—Collateral Security—R. S. C. c. 120, Schedule "C"—53 Vic. c. 31, ss. 74, 75—Renewals—Assignments.

An assignment made in the form "C" to the "Bank Act" as security for a bill or note given in renewal of a past due bill or note is not valid as a security under the seventy-fourth section of the "Bank Act."

The judgment of the Court of Appeal for Ontario (24 Ont. App. R. 152), affirmed.

Bank of Hamilton v. *Halstead* .. xxviii., 235

7.—Suretyship—Recourse of Sureties inter se—Rateable Contribution—Action of Warranty—Discharge of Co-surety—Reserve of Recourse—Trust Funds in Possession of a Surety—Arts. 1156, 1959, C. C.

See Action, 11.

BENEFIT ASSOCIATION.

1.—Rules—Construction—Suspension of Payment—53 Vic. c. 39 (Ont.).

In 1889 the Police Force of Hamilton established a benefit fund, to provide for a gratuity to any member resigning or being incapacitated from length of service or injury, and to the family of any member dying in the service. Each member of the force contributed a percentage of his pay for the purposes of the fund, and one of the rules provided as follows: "No money to be drawn from the fund for any purpose whatever until it reach the sum of eight thousand ($8,000) dollars.

Held, that in case of a member of the force dying before the fund reached the said sum, the gratuity to his family was merely suspended, and was payable as soon as that amount was realized.

Miller v. *Hamilton Police Benefit Fund*, xxviii., 475

2.—Appeal—Special Leave—60 & 61 Vic. (D.) c. 34, s. 1 (*e*)—Benevolent Society—Certificate of Insurance.

An action in which less than the sum or value of one thousand dollars is in controversy, and wherein the decision involves questions as to the construction of the conditions indorsed upon a benevolent society's certificate of insurance, and as to the application of the statute securing the benefit of life insurance to wives and children to such certificates is not a matter of such public importance as would justify an order by the court granted special leave to appeal under the provisions of sub-section (*e*) of the first section of the statute 60 & 61 Vic. c. 34.

Fisher v. *Fisher* .. .. xxviii., 494

BETTING.

Criminal Law—Betting on Election—Stakeholder—R. S. C. c. 159, s. 9—Accessory—R. S. C. c. 145, s. 7—Action for Money Staked—Parties in pari delicto.

R. S. C. c. 159, s. 9, provides *inter alia* that "every one who becomes the custodian or depositary of any money * * * staked, wagered or pledged upon the result of any political or municipal election * * * is guilty of a misdemeanor" and a sub-section says that "nothing in this section shall apply to * * * bets between individuals."

Held, reversing the decision of the Court of Appeal, Taschereau, J., dissenting, that the sub-section is not to be construed as meaning that the main section does not apply to a depositary of money bet between individuals on the result of an election; such depositary is guilty of a misdemeanour, and the bettors are accessories to the offence, and liable as principal offenders. *Reg.* v. *Dillon* (10 Ont. P. R. 352), overruled.

After the election, when the money has been paid to the winner of the bet, the loser cannot recover from the stakeholder the amount deposited by him, the parties being *in pari delicto*, and the illegal act having been performed.

Walsh v. *Trebilcock* .. .. .. xxiii., 695

BIGAMY.

CONSTITUTIONAL LAW—CRIMINAL CODE, SS. 275, 276—CANADIAN SUBJECTS MARRYING ABROAD—JURISDICTION OF PARLIAMENT.

Sections 275 and 276 of the Criminal Code, 1892, respecting the offence of bigamy, are *intra vires* of the Parliament of Canada. Strong, C.J., *contra*.

Criminal Code, 1892, Sections Relating to Bigamy .. .. xxvii., 461

BILL OF EXCHANGE.

1.—"LETTER OF CREDIT"—NEGOTIABLE INSTRUMENT—"BILLS OF EXCHANGE ACT, 1890"—"THE BANK ACT," R. S. C. c. 120.

A bank cannot deal in such securities as a "letter of credit" signed by the Provincial Secretary of Quebec, without the authority of an order in council, which is dependent on the vote of the Legislature, and therefore not a negotiable instrument within th Bills of Exchange Act of 1890, or the Bank Act, R. S. C. c. 120, ss. 45 and 60.

The Jacques Cartier Bank v. *The Queen*, xxv., 84

2.—PROMISSORY NOTES—ACCEPTANCE HELD BY BANK AS INDORSEE—PAYMENT TO CASHIER—PRESUMPTION.

Where an acceptance had been indorsed to a bank, and the cashier of the bank had put it in suit, in his own name, and the acceptor subsequently paid the amount thereof to the cashier; it was held by the Supreme Court of Nova Scotia, that it was a fair inference that payment to the cashier was payment to the bank of which he was cashier (28 N. S. Rep. 210).

On appeal to the Supreme Court of Canada the judgment was affirmed.

Cox v. *Seeley*, 6th May, 1896.

3.—INDORSEMENT OF NOTE—RELEASE OF MAKER—RESERVATION OF RIGHTS—SATISFACTION OF PRINCIPAL DEBT—RELEASE OF DEBTOR—RELEASE OF SURETY.

See Principal and Surety, 7.

AND *see* Promissory Note.

BILL OF LADING.

1.—CONTRACT—CORRESPONDENCE—CARRIAGE OF GOODS—TRANSPORTATION CO.—CARRIAGE OVER CONNECTING LINES.

Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business, and seeks to vary terms of a prior mutual assent. Taschereau, J., dissented on the facts.

N. W. Transportation Co. v. *McKenzie*, xxv., 38

2.—TRANSSHIPMENT OF GRAIN IN TRANSIT—CUSTOM OF TRADE—ORIGINAL BILLS OF LADING CONTINUED—BULK OF CARGO DELIVERED AND FREIGHT EXACTED FROM TRANSFEREE—TRANSFER BY INDORSEMENT—THE BANK ACT—53 VIC. c. 31—ESTOPPEL.

Grain was shipped from Chicago to Montreal, the bills of lading being made only from Chicago to Kingston, where it was, according to the usual custom of trade. transshipped into barges belonging to the defendants, and thence conveyed by them to Montreal, without the issue of new bills of lading. It appeared, however, to have been the custom that such bills of lading were in cases of the kind, treated as continuing. The bills of sale had been transferred by indorsement, and delivery to the plaintiff, upon whose order the defendant had delivered the greater part of the cargo, after exacting payment of full freight upon the shipment. The defendant had also recognized the custom of the grain trade as to the bills of lading continuing.

In an action to recover an undelivered balance of the grain so shipped;

Held, affirming the decision of the Superior Court, sitting in Review, at Montreal, that under the circumstances, the defendant was estopped from questioning the validity of the transfer of the bills of lading under the provisions of "The Bank Act," or objecting that they had become extinct upon delivery of the cargoes at Kingston. *The St. Lawrence and Chicago Forwarding Co.* v. *The Molsons Bank*), 28 L. C. Jur. 127), referred to.

The Kingston Forwarding Co. v. *The Union Bank of Canada*, 9th December, 1895.

3.—Railway Co.—Carriage of Goods—Connecting Lines—Special Contracts—Loss by Fire in Warehouse—Negligence—Pleading.

In an action by S., a merchant at Merlin, Ont., against the Lake Erie and Detroit River Ry. Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G. T. R. Co., and the rest to the C. P. R. and other companies, by the said several companies to be, and the same were, transferred to the Lake Erie, etc., Co., for carriage to Merlin, and that on receipt by the Lake Erie Co. of the goods it became their duty to carry them safely to Merlin, and deliver them to S. There was also an allegation of a contract by the Lake Erie Co. for storage of the goods and delivery to S., when requested, and of lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co., at Merlin.

Held, reversing the decision of the Court of Appeal, that as to the goods delivered to the G. T. R. Co. to be transferred to the Lake Erie Co. as alleged, if the cause of action stated was one arising *ex delicto* it must fail, as the evidence showed that the goods were received from the G. T. R. Co. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G. T. R. Co. to the consignors, and if it was a cause of action founded on contract it must also fail as the contract under which the goods were received by the G. T. R. Co. provided among other things, that the Co. would not be liable for the loss of goods by fire; that goods stored should be at sole risk of the owners; and that the provisions should apply to and for the benefit of every carrier.

Held further, that as to the goods delivered to the companies, other than the G. T. R. Co., to be delivered to the Lake Erie Co., the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the G. T. R. Co., giving subsequent carriers the benefit of their provisions; and that the two courts below had held that the loss was caused by the negligence of servants of the Lake Erie Co., and such finding should not be interfered with.

Held, also, that as to goods carried on a bill of lading issued by the Lake Erie Co., there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one, as the company only undertakes to warehouse goods of necessity and for convenience of shippers.

The Lake Erie and Detroit River Railway Company v. *Sales et al.* .. .. .. xxvi., 663

4.—Contract — Negligence — Stowage — Fragile Goods — Notice — Fault of Servants—Arts. 1674-1676 C. C.—Conditions of Carriage.

See Carrier, 4.

BILL OF SALE.

1.—Chattel Mortgage Description—Bills of Sale Act—R. S. O. (1887) c. 125—Appeal—Order to Amend Pleadings—Interference with — Debtor and Creditor — Purchase by Creditor — Consideration—Existing Debt.

In a chattel mortgage the goods conveyed were described as follows: "All of which said goods and chattels are now the property of the said mortgagor, and are situate in and upon the premises of the London Machine Tool Co. (describing the premises), on the north side of King Street, in the City of London;" and in a schedule referred to in the mortgage was this additional description: "And all machines * * * * in course of construction or which shall hereafter be in course of construction or completed while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor * * * * or which are now or shall be on any other premises in the said City of London."

Held, affirming the decision of the Court of Appeal, that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and if it could the description was not sufficient within the meaning of the Bills of Sale Act (R. S. O. [1887] c. 125) to cover machines so manufactured.

The Supreme Court will not interfere on appeal with an order made by a provincial court granting leave to amend the pleadings, such orders being a matter of procedure within the discretion of the Court below.

A purchaser of goods from the maker of a chattel mortgage in consideration of the discharge of a pre-existing debt is a purchaser for valuable consideration within sec. 5 of the Bills of Sale Act.

Williams v. *Leonard & Sons* .. .. xxvi., 406

2. — Chattel Mortgage — Affidavit of Bona Fides—Compliance with Statutory Forms—Change of Possession—Levy under Execution — Abandonment.

See Chattel Mortgage, 2.

3.—Mortgage—Mining Machinery—Registration—Fixtures—Interpretation of of Terms—Personal Chattels—Delivery—R. S. N. S. (5 ser.) c. 92, ss. 1, 4 & 10 (Bills of Sale)—55 Vic., (N. S.), c. 1, s. 143 (The Mines Act)—41 & 42 Vic. (N. S.), c. 31, s. 4.

See Registry Laws, 5.

BORNAGE.

1.—Encroachment—Mistake of Title—Good Faith—Common Error—Res Judicata—Arts. 412, 413, 429 *et seq.*, 1047, 1241 C. C.—Indemnity—Demolition of Works.

Where, as the result of a mutual error respecting the division line, a proprietor had in good faith, and with the knowledge and consent of the owner of the adjoining lot, erected valuable buildings upon his own property, and it afterwards appeared that his walls encroached slightly upon his neighbour's land, he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of a reasonable indemnity.

In an action for revendication under such circumstances the judgment previously rendered in an action *en bornage* between the same parties cannot be set up as *res judicata* against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions were different.

An owner of land need not have the division lines between his property and contagious lots of land established by regular *bornage* before commencing to build thereon when there is an existing line of separation which has been recognized as the boundary.

Delorme v. *Cusson* .. .. xxviii., 66

2.—Action en Bornage—R. S. Q. Arts. 4153, 4154, 4155—Crown Lands.

See Boundary, 1.

3.—Agreement Respecting Lands—Boundaries — Referee's Decision —Arbitration—Arts. 941-945 and 1341 *et seq.* C. C. P.

See Arbitration, 3.

And *see* Boundary.

BOUNDARY.

1.—Action en Bornage—R. S. Q. Arts. 4153, 4154, 4155—Straight Line.

Where there is a dispute as to the boundary line between two lots granted by patents from the Crown, and it has been found impossible to identify the original line, but two certain points have been recorded in the Crown Lands Department, the proper course is to run a straight line between the two certain points. R. S. Q. art. 4155.

The Bell's Asbestos Co. v. *Johnson's Co.*, xxiii., 225

2.—Title to Land — Boundaries — Road Allowance—Evidence — Appreciation of Testimony.

See Title to Land, 6.

3.—Title to Land—Action en bornage—Surveyor's Report — Judgment on — Acquiescence in Judgment — Chose jugee.

See Title to Land, 9.

4.—Appeal—Action en bornage—Future Rights—Title to Lands—R. S. C. c. 135, s. 29 (*b*)—54 & 55 Vic. c. 25, s. 3 —56 Vic. c. 29, s. 1.

See Appeal, 53.

5.—Boundary Marks—Possessory Action Delivery of Possession — Vacant Lands.

See Evidence, 29.

And *see* "Bornage."

BRIDGES.

Jurisdiction over — County Council — Bridges over One Hundred Feet Wide—Ontario Municipal Act—R. S. O. (1887) c. 184, ss. 532, 534.

See Municipal Corporations, 4.

BUILDING SOCIETY.

Participating Borrowers—Shareholders —C. S. L. C. c. 69—42 & 43 Vic. c. 32 (Q.) — Liquidation — Expiration of Classes — Assessments on Loans — Notice of — Interest and Bonus — Usury Laws—C. S. C. c. 58—Art. 1785 C. C.—Administrators and Trustees—Sales to—Prete-nom—Art. 1484 C. C.

S. applied to a building society for a loan of $3,500, which was subsequently advanced to him upon signing a deed of obligation and hypothec submitting to the conditions and rules applicable to the society's method

of carrying on its loaning business, and declaring that he had become a subscriber for shares in the company's stock for an amount corresponding to the amount of the loan, namely 70 shares of the nominal value of $50 each in a class to expire after 72 monthly payments, or in six years from the date of its commencement (July, 1878), this term corresponding with the term fixed for the repayment of the loan. He thereby also agreed to make monthly payments of one per cent. each upon the stock, and that the loan should be repaid at the expiration of the class, when, upon the liquidation of the business of that class, members would be entitled to the allotment of their shares subscribed as paid up, partly by monthly instalments, and partly by accumulated profits to be derived from whatever moneys had been paid in and invested for the benefit of that class, at which time whatever he might be so entitled to receive in shares of stock should be credited towards the reimbursement of the loan. He further obliged himself to pay, as interest and bonus, the additional sum of one per cent. upon the loan by similar monthly instalments during the time it remained unpaid. S. paid all the instalments by semi-annual payments of $420 each until 1st May, 1884, making a total of seventy monthly instalments of $70 each, leaving two more instalments of each kind still to become due before the date originally fixed for the termination of his class. The society went into liquidation under the provisions of 42 & 43 Vict. cap. 32 (Que.), in January, 1884, prior to A.'s last payment and about six months before the date fixed for the expiration of his loan. In October, 1884, the liquidators of the society, in the exercise of the powers vested in the directors under the deed, and the society's regulations, passed a resolution declaring a deficit in the business of the class to which A. belonged, and, in order to provide the necessary funds to meet the proportion of deficit attributed as his share, they thereby exacted from him a further series of twenty-eight monthly payments in addition to the seventy-two instalments contemplated at the time of the execution of the deed. Subsequently (in 1892), the plaintiff, as transferee of the society, brought action for the two original instalments remaining unpaid, and also for the amount of the twenty-eight additional monthly payments upon the loan and the subscription of shares.

Held, reversing the judgment of the Court of Queen's Bench, that the subscription for shares, and the obligation undertaken in the deed constituted, upon the part of the borrower, merely one transaction involving a loan and an agreement to repay the amount advanced with interest and bonuses thereon amounting together to a rate equivalent to interest at twelve per centum per annum, on the amount of his loan; that the contract made by the building society stipulating that they were to receive such rate of interest and bonus, equivalent to rate of twelve per centum per annum on the amount so loaned by the society, was not a violation of any laws respecting usury in force in the Province of Quebec; that the fact of the building society going into liquidation had the effect of causing all classes of loans then current to expire at the date when the society was placed in liquidation, notwithstanding that the various terms for which such classes may have been established had not been fully completed; that under the provisions of the statute, 42 & 43 Vic. c. 32, liquidators have the same powers in regard to the determination of the affairs of expired classes, and to declare deficits therein, and to call for further payments to meet the same, as the directors of the society had while it continued in operation; that the notice required by the twenty-first section of the Act, 42 & 43 Vic. c. 32, does not apply to cases where liquidators have determined a loss upon the expiration of a class, and required the full amount exigible upon loans to be paid by borrowers; that, notwithstanding that the liquidation proceedings deprived the directors of the exercise of their powers as to the determination of the condition of the affairs of a class, and the exaction of further payments when exigible in such cases on the expiration of a class, the resolution of the liquidators determining a deficit in the borrower's class, and requiring full payment of all sums exigible under his deed of obligation, was sufficient to constitute a valid right of action against the borrower for the amount of the balance of principal money loaned together with the interest and bonus instalments remaining due thereon according to the terms and conditions of his deed of obligation.

Held, further, affirming the decisions of both Courts below, that in an action where no special demand to that effect has been made, the Court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of article 1484 of the Civil Code.

Guertin v. *Sansterre* .. .. .. xxvii., 522

BUILDINGS AND ERECTIONS.

LESSOR AND LESSEE—WATER LOTS—FILLING IN—"BUILDINGS AND ERECTIONS"—"IMPROVEMENTS."

See Lessor and Lessee, 2.

BY-LAW.

1.—Bonus—By-law—Conditions of — Conditional Mortgage.

By a by-law passed by the City of Three Rivers on the 3rd March, 1886, granting a bonus of $20,000 to a firm for establishing a saw-mill and a box factory within the city limits, and a mortgage for a like amount of $20,000 granted by the firm to the corporation on the 26th of November, 1886, it was provided that the entire establishment of a value equivalent to not less than $75,000 should be kept in operation for the space of four consecutive years from the beginning of said operation, and that 150 people at least should be kept employed during the space of five months of each of the four years. The mill was in operation in June, 1886, and the box factory on the 2nd November, 1886. They were kept in operation, with interruptions, until October, 1889, and at least six hundred men were employed in both establishments during that time. On a contestation, by subsequent hypothecary claimants, of an opposition *afin de conserver*, filed by the corporation for the amount of their conditional mortgage on the proceeds of sale of the property.

Held, reversing the judgment of the courts below, that even if the words "four consecutive years" meant four consecutive seasons, there was ample evidence that the whole establishment was not in operation as required until November, 1886, when the mortgage was granted, the mill only being completed and in operation during that season, and therefore there had been a breach of the conditions. Fournier, J., dissenting.

The City of Three Rivers v. *La Banque du Peuple* .. .. xxii., 352

2.—Municipal Corporation — Connection with Drain—Permission of Engineer—Resolution of Council—Compliance with By-law.

Where a by-law provided that no connection should be made with a sewer, except by permission of the City Engineer, a resolution of the City Council granting an application for such connection on terms which were complied with, and the connection made, was a sufficient compliance with said by-law.

Lewis v. *Alexander* .. .. .. xxiv., 551

3.—Construction of Statute—Special Act—Repeal by General Act—Repeal by Implication.

A general later statute (and *a fortiori* a statute passed at the same time) does not abrogate an earlier special Act by mere implication. The law does not allow an interpretation that would have the effect of revoking or altering a special enactment by the construction of general words, where the terms of the special enactment may have their proper operation without such interpretation.

The City of Vancouver v. *Bailey* .. xxv., 62

3*a*. — Municipal Corporation — By-law — Construction of Statute—Art. 4529, R. S. Q.—Approval of Electors—Appeal as to Costs.

Under the provisions of Art. 4529 of the Revised Statutes of Quebec money by-laws for loans by town corporations require the approval of the majority both in number and in value of the municipal electors who are proprietors of real estate within the municipality, as ascertained from the municipal rolls.

The Town of Chicoutimi v. *Price*, 12th Oct., 1898 .. .. xxix.

4.—Local Improvement—Notice to Ratepayers—Variation from Notice.

See Municipal Corporation, 1.

5.—Municipal Corporation—Street Railway — Construction Beyond Limits of Municipality—Validating Act.

See Municipal Corporation, 2.

6.—Municipal Council—Power to License, Regulate and Govern Trade — Partial Prohibition — Repugnant Provisions—Ontario Municipal Act, R. S. O. (1887) c. 184.

See Municipal Corporation, 6.

7.—City of Toronto—Water Supply — Rates to Consumers—Discrimination in Rates—Government Buildings.

See Municipal Corporation, 11.

8.—High School District—Townships Detached—Ultra Vires.

See Schools, 1.

9.—Petition for Drain—Withdrawal of Name—Insufficient Names.

See Drainage, 1.

10.—Petition to Quash—R. S. Q. Art. 4,389—Right of Appeal—R. S. C. c. 135, s. 24 (*g*).

See Appeal, 22.

11.—Sale of Liquor—Cumulative Taxes—Special Tax.

See Municipal Corporation, 12.

12.—Petition to Quash By-law—Appeal to Court of Queen's Bench—Judgment Quashing—Appeal to Supreme Court—R. S. C. c. 135, s. 24 (*g*).

See Appeal, 36.

13.—Construction of Statute—By-law—Exclusive Rights—Statute Confirming—Extension of Privilege—C. S. C. c. 65—45 Vic. (Que.), c. 79, s. 5.

See Statute, 23.

14.—Registration of By-law — Notice—Registry Act—R. S. O. (1877) c. 114.

See Registry Laws, 1.

15.—Special Tax—Local Improvements.

See Assessments, 6.

16.—Municipal By-law—Special Assessments—Drainage—Powers of Councils as to Additional Necessary Works—Ultra Vires Resolutions—Executed Contract.

See Municipal Corporation, 24

17.—Constitutional Law—Municipal Corporation—Powers of Legislature—License — Monopoly — Highways and Ferries—Tolls—Navigable Streams—By-laws and Resolutions—Intermunicipal Ferry—Disturbance of Licensee—Club Associations, Companies and Partnerships — Northwest Territories Act, R. S C. c. 50, ss. 12 and 24—B. N. A. Act (1867) c. 92, ss. 8, 10 and 16—Rev. Ord. N. W. T. (1888), c. 28—N. W. Ter. Ord. No. 7 of 1891-92, s. 4.

See Constitutional Law, 14.

18.—Municipal Corporation — By-law — Assessment — Local Improvements — Agreement with Owners of Property—Construction of Subway—Benefit to Lands.

See Municipal Corporation, 28.

19.—Intermunicipal Drainage—Initiation and Contribution—Ontario Drainage Act — Consolidated Municipal Act — Assessment.

See Drainage, 2.

20.—Municipal Corporation—Negligence—Snow and Ice on Sidewalks—Construction of Statute—55 Vic. c. 42, s. 531 (O.)—57 Vic. c. 50, s. 13 (O.)—Finding of Jury—Gross Negligence.

See Negligence, 25.

21.—Waterworks — Resolution — Agreement in Writing — Injunction—Art. 1033*a* C. C. P.

See Injunction.

22. — Municipal Corporation — Railway Aid—Debentures—Sale of Shares at Discount — Trustee — Debtor and Creditor—Division of County—Erection of New Municipalities—Assessment—Action en Reddition de Comptes—Arts. 78, 164, 939 Mun. Code, Que.—24 Vic. c. 30 (Que.)—29 Vic. c. 50 (Que.).

See Action, 19.

CADASTRAL PLANS.

Evidence — Admissions — Arts. 1243-1245 C. C.

Statements entered upon cadastral plans and official books of reference made by public officials, and filed in the lands registration offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof at the time the entries were made.

Durocher v. *Durocher* .. .. .. xxvii., 363

CANADA TEMPERANCE ACT.

1.—Application of Fines Under—Incorporated Town Separated from County for Municipal Purposes.

By order in council made in September, 1886, it is provided that "all fines, penalties or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county, or any incorporated town separated for municipal purposes from the county * * * * shall be paid to the treasurer of the city, incorporated town or county," etc.

Held, reversing the decision of the Supreme Court of New Brunswick, King, J., dissenting, that to come within the terms of this order an incorporated town need not be separated from the county for all purposes; it includes any town having municipal self-government even though it contributes to the expense of keeping up certain institutions in the county.

Town of St. Stephen v. *The County of Charlotte* .. .. xxiv., 329

2.—Search Warrant—Magistrate's Jurisdiction—Justification of Ministerial Officers—Goods in Custodia Legis—Replevin—Estoppel—Res Judicata.

A search warrant issued under "The Canada Temperance Act" is good if it follows the prescribed form, and if it has been issued by competent authority, and is valid on its face, it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside. Taschereau, J., dissenting.

The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise

A judgment on *certiorari* quashing the warrant will not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside, and such judgment was a judgment *inter partes* only. Taschereau, J., dissenting.

Sleeth v. *Hurlbert* .. .. xxv., 620

CARRIERS.

1. — Contract — Correspondence — Carriage of Goods—Transportation Co. —Carraige over Connecting Lines—Bill of Lading.

A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped.

Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud, or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business, and seeks to vary terms of a prior mutual assent.

Taschereau, J., dissented on the facts.

N. W. Transportation Co. v. *McKenzie*, xxv., 38

2.—Bailees—Common Carriers — Express Company—Receipt for Money Parcel —Conditions Precedent—Formal Notice of Claim—Pleading—Money Had and Received—Special Pleas.

Where an express company gave a receipt for money to be forwarded with the condition indorsed that the company should not be liable for any claim in respect of the package, unless within sixty days of loss or damage a claim should be made by written statement, with a copy of the contract annexed:

Held, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver the parcel to the consignee. *Richardson* v. *The Canada West Farmers Ins. Co.* (16 U. C. C. P. 430), distinguished.

In an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted" puts in issue all material facts necessary to establish the plaintiff's right of action.

The Northern Express Co. v. *Martin et al.*, xxvi., 135

3.—Ships and Shipping—Chartered Ship—Perishable Goods—Ship Disabled by Excepted Perils — Transshipment — Obligation to Transship — Repairs — Reasonable Time—Carrier—Bailee.

If a chartered ship be disabled by excepted perils from completing the voyage the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination, and earn the freight.

The option to transship must be exercised within a reasonable time, and if repairs are decided upon they must be effected with reasonable despatch, or otherwise the owner of the cargo becomes entitled to his goods.

Quære—Is the shipowner obliged to transship?

If the goods are such as would perish before repairs could be made, the shipowner should either transship, deliver them up or sell, if the cargo owner does not object, and his duty is the same if a portion of the cargo, severable from the rest, is perishable.

And if in such a case the goods are sold without the consent of the owner the latter is entitled to recover from the shipowner the amount they would have been worth to him if he had received them at the port of shipment, or at their destination at the time of the breach of duty.

Owen v. *Outerbridge* .. .. .. xxvi., 272

4. — Maritime Law — Affreightment — Charter Party—Privity of Contract — Negligence — Stowage — Fragile Goods—Bill of Lading—Condition—Notice—Arts. 1674, 1675, 1676 C. C.—Contract Against Liability for Fault of Servants—Arts. 2383 (8), 2390, 2409, 2413, 2424, 2427, C. C.

The chartering of a ship with its company for a particular voyage by a transportation company does not relieve the owners

and masters from liability upon contracts of affreightment during such voyage where the exclusive control and navigation of the ship are left with the master, mariners, and other servants of the owners, and the contract had been made with them only.

The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse shipowners from liability for damages caused through improper or insufficient stowage.

A condition in a bill of lading, providing that the shipowners shall not be liable for negligence on the part of the master or mariners, or their other servants or agents is not contrary to public policy nor prohibited by law in the Province of Quebec.

When a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur, whether from negligence, rough handling or any other cause whatever, and that the owners were to be "exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding and all other accidents of navigation, even though the damage or loss from these may be attributable to some wrongful act, fault, neglect or error in judgment of the pilot, master, mariners or other servants of the shipowners; nor for breakage or any other damage arising from the nature of the goods shipped," such provisions applied only to loss or damage resulting from acts done during the carriage of the goods, and did not cover damages caused by neglect or improper stowage prior to the commencement of the voyage.

The Glengoil Steamship Company v. *Pilkington.*

The Glengoil Steamship Company v. *Ferguson.*
xxviii., 146

5.—Passengers — Railway Company — Latent Defect—Arts. 1053, 1673, 1678 C. C.

See Railways, 4.

6.—Railway Company—Carriage of Goods —Connecting Lines—Special Contract —Loss by Fire in Warehouse—Negligence—Pleading.

See Railways, 15.

CASE RESERVED.

Motion for Refused—Refusal Affirmed Unanimity on one of Several Grounds —Appeal—Fraudulent Appropriation —Bailee or Trustee—Unlawful Receiving—Simultaneous Acts.

See Criminal Law, 2.

CERTIFICATE.

1.—Contract for Public Work—Extras—Final Certificate—Pleading.

See Contract, 5.

2.—Contract—Public Work—Final Certificate of Engineer—Previous Decision—Necessity to Follow.

See Res Judicata, 6.

3.—Contract — Public Work — Progress Estimates — Engineer's Certificate—Revision by Succeeding Engineer—Action for Payment on Monthly Certificate.

See Contract, 29.

CHAMPERTY.

Will—Sheriff's Deed—Proof of Heirship—New Trial.

See Evidence, 27.

CHARTER PARTY.

Contract—Negligence—Stowage—Bill of Lading—Notice—Arts. 1674, 1675, 1676, 2383, 2390, 2409, 2413, 2424, 2427 C. C.—Liability of Owners.

See Carriers, 4.

CHATTEL.

Fixtures—Severance from Realty—Conditional Sales — Unpaid Vendor — Hypothecary Creditor — Arts. 379, 2017, 2083, 2085, 2089 C. C.

See Contract, 30.

CHATTEL MORTGAGE.

1.—Affidavit of Bona Fides—Compliance with Statutory Form—R. S. N. S. (5 ser.) c. 92, s. 4.

By R. S. N. S. (5 ser.), c. 92, s. 4, every chattel mortgage must be accompanied by an affidavit of *bona fides*, "as nearly as may be" in the form given in a schedule to the Act. The form of the jurat to such affidavit in the schedule is: "Sworn to at in the county of , this day of A.D. . Before me a commissioner, etc.

Held, reversing the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that where the jurat to an affidavit was "sworn to at Middleton this 6th day of July, A.D. 1891." etc., without naming the county, the mortgage was void, notwithstanding the affidavit was headed "in

the County of Annapolis." *Archibald* v. *Hubley* (18 Can. S. C. R. 116), followed; *Smith* v. *McLean* (21 Can. S. C. R. 355) distinguished.

Morse v. *Phinney* .. .. xxii., 563

2.—Affidavit of Bona Fides—Compliance with Statutory Forms—Change of Possession—Levy under Execution—Abandonment.

N. executed a chattel mortgage of his effects, and shortly afterwards made an assignment to one of the mortgagees, in trust for the benefit of his creditors. The assignee took possession under the assignment.

Held, affirming the decision of the Supreme Court of Nova Scotia, that there was no delivery to the mortgagees under the mortgage which transferred to them the possession of the goods.

The Bills of Sale Act, Nova Scotia, R. S. N. S. (5 ser.), c. 92, by s. 4 requires a mortgage given to secure an existing indebtedness to be accompanied by an affidavit in the form prescribed in a schedule to the Act, and by s. 5, if the mortgage is to secure a debt not matured the affidavit must follow another form. By s. 11, either affidavit must be, "as nearly as may be," in the forms prescribed. A mortgage was given to secure both a present and future indebtedness, and was accompanied by a single affidavit combining the main features of both forms.

Held, affirming the decision of the Court below, Gwynne, J., dissenting, that this affidavit was not "as nearly as may be," in the form prescribed; that there would have been no difficulty in complying strictly with the requirements of the Act; and though the legal effect might have been the same the mortgage was void for want of such compliance.

Reid v. *Creighton* .. .. xxiv., 69

3.—Preference—Hindering and Delaying Creditors—Statute of Elizabeth.

In an assignment for benefit of creditors one preferred creditor was to receive nearly $300 more than was due him from the assignor, on an understanding that he would pay certain debts due from the assignor to other persons, amounting in the aggregate to the sum by which his debt was exceeded. The persons so to be paid were not parties to nor named in the deed of assignment.

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that as the creditors to be paid by the preferred creditor could not enforce payment from him or from the assignor who had parted with all his property, they would be hindered and delayed in the recovery of their debts, and the deed was, therefore, void under the statute of Elizabeth.

McDonald v. *Cummings* .. .. .. xxiv., 321

4.—Construction of Statute—55 Vic. c. 26, ss. 2 and 4 (O.)—Chattel Mortgage—Agreement not to Register—Void Mortgage—Possession by Creditor.

By the Act relating to chattel mortgages (R. S. O. [1887] c. 125), a mortgage not registered within five days after execution is "void as against creditors," and by 55 Vic. c. 26, s. 2 (O.), that expression is extended to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the Act respecting assignments and preferences (R. S. O. [1887] v. 124).—By sec. 4 of 55 Vic. c. 26, a mortgage so void shall not, by subsequent possession by the mortgagee of the things mortgaged, be made valid "as against persons who became creditors * * * before such taking of possession."

Held, reversing the decision of the Court of Appeal, that under this legislation a mortgage so void is void against all creditors, those becoming such after the mortgagee has taken possession as well as before, and not merely as against those having executions in the sheriff's hands at the time possession is taken, simple contract creditors who have commenced proceedings to set aside, and an assignee appointed before the mortgage was given; that the words "suing on behalf of themselves and other creditors," in the amending Act, only indicate the nature of proceedings necessary to set the mortgage aside, and that the same will enure to the benefit of the general body of creditors; and that such mortgage will not be made valid by subsequent taking of possession.

Held, per Strong, C.J., that where a mortgage is given in pursuance of an agreement that there shall be neither registration nor immediate possession such mortgage is, on grounds of public policy, void *ab initio*.

Clarkson et al. v. *McMaster & Co.* .. xxv., 96

5.—Assignment for Benefit of Creditors—Preferences—R. S. N. S. c. 92, ss. 4, 5, 10—Chattel Mortgage—Statute of Elizabeth.

Though an assignment contains preferences in favour of certain creditors, yet if it includes, subject to such preferences, a trust in favour of all the assignor's creditors it is "an assignment for the general benefit of creditors" under section 10 of the Nova Scotia Bills of Sale Act (R. S. N. S. c. 92),

and does not require an affidavit of *bona fides*. *Durkee* v. *Flint* (19 N. S. Rep. 487) approved and followed; *Archibald* v. *Hubley* (18 Can. S. C. R. 116), distinguished.

A provision in an assignment for the security and indemnity of makers and indorsers of papers not due, for accomodation of the debtor, does not make it a chattel mortgage under sec. 5 of the Act, the property not being redeemable and the assignor retaining no interest in it.

Kirk v. *Chisholm* .. .. xxvi., 111

6.—Chattel Mortgage — Mortgagee in Possession—Negligence — Wilful Default—Sale under Powers—Slaughter Sale"—Practice—Assignment for the Benefit of Creditors—Revocation of.

A mortgagee in possession who sells the mortgaged goods in a reckless and improvident manner is liable to account not only for what he actually receives, but for what he might have obtained for the goods had he acted with a proper regard for the interests of the mortgagor.

An assignment for the benefit of creditors is revocable until the creditors either execute or otherwise assent to it.

Under the provisions of R. S. O. c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his original right of action.

Where creditors refused to accept the benefit of an assignment under R. S. O. c. 124, and the assignor was notified of such refusal, and that the assignment had not been registered, an action for damages was properly brought in the name of the assignor against a mortgagee of his stock in trade who sold the goods in an improper manner.

Rennie v. *Block et al* .. .. .. xxvi., 356

7.—Description—Bills of Sale Act—R. S. O. (1887) c. 125—Appeal—Order to Amend Pleadings—Interference with—Debtor and Creditor—Purchase by Creditor — Consideration — Existing Debt.

In a chattel mortgage the goods conveyed were described as follows: "All of which said goods and chattels are now the property of the said mortgagor, and are situate in and upon the premises of the London Machine Tool Co. (describing the premises), on the north side of King Street, in the City of Londos;" and in a schedule referred to in the mortgage was this additional description: "And all machines * * * in course of construction, or which shall hereafter be in course of construction or completed while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor * * or which are now or shall be on any other premises in the said City of London."

Held, affirming the decision of the Court of Appeal, that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and if it could the description was not sufficient within the meaning of the Bills of Sale Act (R. S. O. [1887] c. 125), to cover machines so manufactured.

The Supreme Court of Canada will not interfere on appeal with an order made by a provincial court granting leave to amend the pleadings, such orders being a matter of procedure within the discretion of the court below.

A purchaser of goods from the maker of a chattel mortgage in consideration of the discharge of a pre-existing debt is a purchaser for valuable consideration within sec. 5 of the Bills of Sale Act.

Williams v. *E. Leonard & Sons* .. xxvi., 406

8.—Mortgage of Goods Insured—Condition Against Assigning Policy — Breach.

See Insurance, Fire, 2.

9.—Mortgage on Goods Insured—Condition Against Sale, Transfer or Change of Title—Breach.

See Insurance, Fire, 3.

CHATTELS, PERSONAL.

Mortgage—Mining Machinery—Registration — Fixtures — Interpretation of Terms — Bill of Sale — Personal Chattels—R. S. N. S. (5 Ser.) c. 92, ss. 1, 4 and 10 (Bills of Sale)—55 Vic. (N. S.), c. 1, s. 143 (The Mines Act)—41 & 42 Vic. (N. S.) c. 31, s. 4.

See Mortgage, 7.

CHOSE IN ACTION.

See Assignment.

CHOSE JUGEE.

See Res Judicata.

CIVIL SERVICE.

1.—Construction of Statute—R. S. C. c. 18—Abolition of Office—Discretionary Power—Jurisdiction.

Employees in the Civil Service of Canada who may be retired or removed from office

under the provisions of the eleventh section of "The Civil Service Superannuation Act" (R. S. C. c. 18), have no absolute right to any superannuation allowance under that section, such allowance being by the terms of the Act entirely in the discretion of the executive authority.

Balderson v. *The Queen* .. .. xxviii., 261

2.—Extra Salary—Additional Remuneration—Permanent Employees—51 Vic. c. 12, s. 51.

See Statute, Construction of, 35.

CODICIL.

1.—Will—Revocation — Revival — Intention to Revive—Reference to Date—Removal of Executor—Statute of Mortmain — Will Executed under Mistake—Ontario Wills Act, R. S. O. (1887) c. 109—9 Geo. II. c. 36 (Imp.).

A will which has been revoked cannot, since the passing of the Ontario Wills Act (R. S. O. [1887] c. 109), be revived by a codicil unless the intention to revive it appears on the face of the codicil either by express words referring to the will as revoked and importing such intention, or by a disposition of the testator's property inconsistent with any other intention, or by other expressions conveying to the mind of the court, with reasonable certainty, the existence of the intention in question.

A reference in the codicil to a date of the revoked will, and the removal of the executor named therein, and substitution of another in his place, will not revive it.

Held, per King, J., dissenting, that a codicil referring to the revoked will by date and removing an executor named therein is sufficient indication of an intention to revive such will, more especially when the several instruments are executed under circumstances showing such intention.

Macdonell v. *Purcell*.

Cleary v. *Purcell* .. .. xxiii., 101

2.—Will—Devise to two Sons—Devise over of one Share—Condition—Context—Codicil.

A testator devised property "equally" to his two sons J. S. and T. G., with a provision that "in the event of the death of my said son T. G., unmarried, or without leaving issue," his interest should go to J. S. By a codicil a third son was given an equal interest with his brothers in the property, on a condition, which was not complied with, and the devise to him became of no effect.

Held, reversing the decision of the Supreme Court of Nova Scotia, that the codicil did not affect the construction to be put on the devise in the will; that J. S. and T. G. took as tenants in common in equal moieties the estate of J. S. being absolute, and that of T. G. subject to an executory devise over in case of death at any time, and not merely during the lifetime of the testator. *Cowan* v. *Allen* (26 Can. S. C. R. 292), followed.

Held, also, that the word "equal" indicated the respective shares which the two devisees were to take in the area of the property devised, and not the character of the estates given in those shares.

Fraser v. *Fraser* .. .. xxvi., 316

COLLISION.

Maritime Law—Collision—Rules of the Road—Narrow Channel—Navigation, Rules of—R. S. C. c. 79, s. 2, Arts. 15, 16, 18, 19, 21, 22 and 23—"Crossing" Ships—"Meeting" Ships—"Passing" Ships—Breach of Rules—Presumption of Fault—Contributory Negligence—Moiety of Damages—36 and 37 Vic. (Imp.) c. 85, s. 17—Manoeuvres in "Agony of Collision."

See Admiralty Law, 2.

COLLOCATION.

Contestations of Report — Appeal — Amount in Controversy—Pecuniary Interest of Appellant—Arts. 746, 747 C. C. P.

See Appeal, 45.

And *see* Judgment of Distribution.

COMMISSION.

Appeal—Evidence taken by Commission—Reversal on Questions of Fact.

Where the witnesses have not been heard in the presence of the Judge, but their depositions were taken before a commissioner, a Court of Appeal may deal with the evidence more fully than if the trial Judge had heard it, or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it.

Malzard v. *Hart* .. .. xxvii., 510

COMMITMENT.

Form of—Jurisdiction—Judicial Notice—R. S. C. c. 135, s. 32.

See Habeas Corpus, 1.

COMMON SCHOOL FUND ARBITRATION.

See Constitutional Law.

COMPENSATION.

PARTNERSHIP — JUDICIAL ABANDONMENT — CONFUSION OF RIGHTS—COMPOSITION AND DISCHARGE.

See Abandonment, 1.

COMPANY.

1.—STOCK IN—PAYMENT ON SHARES—APPROPRIATION OF PAYMENT BY COMPANY—PORTION TREATED AS PAID UP—LEGALITY OF COMPANY'S ACTION.

N., a director and shareholder of a railway company, agreed to lend the company $100,000, taking among other securities for the loan 168 shares held by B., which were to be paid up. B. owned 188 shares, on which he had paid an amount equal to 40 per cent. of their value, but being unable to pay the balance the directors of the company agreed to treat the sum paid as payment in full for 75 of the 188 shares, and B. consented to transfer that number to N. as fully paid up. N. agreed to this and B. signed a transfer, which was entered on the books of the company. There was no formal resolution by the board of directors authorizing the appropriation of the money paid by B. A judgment creditor of the railway company whose writ of execution had been returned *nulla bona* brought an action against N. for payment of his debt, claiming that only 40 per cent. had been paid on the 75 shares, and that the remaining 60 per cent. was still due the company thereon. A judgment in favour of N. was affirmed by the Divisional Court, but reversed by the Court of Appeal, on the ground that the appropriation by the directors of the money paid by B. was invalid for want of a formal resolution authorizing it.

Held, reversing the judgment of the Court of Appeal, Gwynne, J., dissenting, that the company having got the benefit of the loan by N. were estopped from disputing the application of the money paid by B. in such a way as to constitute N. the holder of the 75 shares, upon the security of which the loan was made, and creditors, not having been prejudiced, are bound in the same way; and the transaction being binding between B. and the company, and not objectionable as regards creditors, N. could acept the 75 shares in lieu of the 168 he was entitled to.

Neelon v. *The Town of Thorold* .. xxii., 390

2.—WINDING-UP ACT — CONTRIBUTORY — SHARES PAID FOR BY TRANSFER OF PROPERTY—ADEQUACY OF CONSIDERATION—PROMOTER SELLING PROPERTY TO COMPANY—TRUST—FIDUCIARY RELATION.

Shares in a joint stock company may be paid for in money or money's worth, and if paid for by a transfer of property they must be treated as fully paid up.

In proceediigs under the Winding-up Act the Master has no authority to inquire into the adequacy of the consideration with a view to placing the holder on the list of contributories.

There is a distinction between a trust for a company of property acquired by promoters and afterward sold to the company, and the fiduciary relationship engendered by the promoters, between themselves and the company, which exists as soon as the latter is formed. A promoter who purchases property with the intention of selling it to a company to be formed does not necessarily hold such property in trust for the prospective company, but he stands in a fiduciary relation to the latter, and if he sells to them must not violate any of the duties devolving upon him in respect to such relationship. If he sells, for instance, through the medium of a board of directors, who are not independent of him, the contract may be rescinded provided the property remains in such a position that the parties may be restored to their original status. There may be cases in which the property may be regarded as being bound by a trust either *ab initio* or in consequence of *ex post facto* events; if a promoter purchases property from a vendor who is to be paid by the company when formed, and by a secret arrangement with the vendor a part of the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit which he cannot retain; and if any part of such secret profit consists of paid-up shares of the company issued as part of the purchase price of the property such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares for which the promoter may be made a contributory.

In re Hess Mfg. Co.; *Edgar* v. *Sloan*, xxiii., 644

3.—WINDING-UP ACT—SALE BY LIQUIDATOR—PURCHASE BY DIRECTOR OF INSOLVENT COMPANY—FIDUCIARY RELATIONSHIP—R. S. C. c. 129, s. 34.

Upon the appointment of a liquidator for a company being wound up under R. S. C. c. 129 (The Winding-up Act), if the powers of the directors are not continued, as provided by s. 34 of the Act, their fiduciary

relations to the company or its shareholders are at an end, and a sale to them by the liquidator of the company is valid.

Chatham National Bank v. *McKeen*, xxiv., 348

4.—Joint Stock Company—Ultra Vires Contract—Consent Judgment—Action to set Aside.

A company incorporated for definite purposes has no power to pursue objects other than those expressed in its charter, or such as are reasonably incidental thereto, nor to exercise their powers in the attainment of authorized objects in a manner not authorized by the charter. The assent of every shareholder makes no difference.

If a company enters into a transaction which is *ultra vires* and litigation ensues, in the course of which a judgment is entered by consent, such judgment is as binding upon the parties as one obtained after a contest, and will not be set aside because the transaction was beyond the power of the company.

Charlebois et al. v. *Delap et al.* .. xxvi, 221

5.—Constitutional Law—Municipal Corporation—Powers of Legislature—License — Monopoly — Highways and Ferries—Tolls—Navigable Streams—By-laws and Resolutions—Intermunicipal Ferry — Disturbance of Licensee — Club Associations, Companies and Partnerships—North-west Territories Act, R. S. C. c. 50, ss. 13 and 24—B. N. A. Act (1867), s. 92, ss. 8, 10 and 16—Rev. Ord. N. W. T. (1888) c. 28—N. W. T. Ord. No. 7 of 1891-2, s. 4.

See Constitutional Law, 14.

6.—Banking—Bills of Exchange and Promissory Notes—Discount by President—Credit to Company's Account—Payments out to Company's Creditors—Liability of Company upon Note given without Authority — Bona Fides.

Where the president of an incorporated company made a promissory note in the company's name, without authority, and discounted it with the company's bankers, the proceeds being credited to the company's account, and paid out by cheques in the company's name to its creditors, whose claims should have been paid by the president out of funds which he had previously misappropriated, the bankers, who had taken the notes in good faith are entitled to charge the amount thereof at maturity against the company's account.

Judgment of the Court of Appeal for Ontario (23 Ont. App. R. 66), affirmed.

The Bridgewater Cheese Factory Company v. *Murphy*, 21st May, 1896 .. .. .. xxvi., 443

7.—Directors — By-law — Ultra Vires—Discount Shares—Calls for Unpaid Balances—Contributories — Trustees Powers—Contract—Fraud—Breach of Trust—Construction of Statute—C. S. M. c. 9—R. S. M. c. 25, ss. 30, 33.

The directors of a joint stock company incorporated in Manitoba have no powers under the provisions of "The Manitoba Joint Stock Companies Incorporation Act" to make allotments of the capital stock of the company at a rate per share below the face value, and any by-law or resolution of the directors assuming to make such allotment without the sanction of a general meeting of the shareholders of the company is invalid.

A by-law or resolution of the directors of a joint stock company, which operates unequally towards the interests of any class of the shareholders is invalid and *ultra vires* of the company's powers.

Where shares in the capital stock of a joint stock company have been illegally issued below par, the holder of the shares is not thereby relieved from liability for calls for the unpaid balances of their par value.

Judgment of the Court of Queen's Bench for Manitoba (11 Man. L. R. 629) reversed, Taschereau, J., dissenting.

The North-west Electric Co. v. *Walsh*, 13 h October, 1898 .. .. xxix.

8.—Joint Stock Company — Irregular Organization — Subscription for Shares—Withdrawal — Surrender — Forfeiture — Duty of Directors — Powers — Cancellation of Stock — Ultra Vires—"The Companies Act"—"The Winding-up Act" — Contributories — Pleading — Construction of Statute.

After the issue of an order for the winding-up of a joint stock company incorporated under "The Companies Act." (R. S. C. c. 110), a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company as, under the provisions of the Act, such grounds may be taken only upon direct proceedings at the instance of the Attorney-General.

The powers given directors of a joint stock company, under "The Companies

Act (R. S. C. c. 110), as to forfeiture of shares for non-payment of calls, are intended to be exercised only when the circumstances of the shareholder render it expedient in the interests of the company, and they cannot be employed for the benefit of the shareholder.

Common v. *McArthur*, 14th December, 1898, xxix.

9.—Forfeiture of Charter — Estoppel — Compliance With Statute—Action—Res Judicata.

In an action against a River Improvement Company for repayment of tolls alleged to have been unlawfully collected, it was stated that the dams, slides, etc., for which tolls were claimed were not placed on the properties mentioned in the letters patent for the company; that the company did not comply with the statutory requirements that the works should be completed within two years from the date of incorporation whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters, contrary to the provisions of the Timber Slide Company's Act, and could not exact tolls in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands whose report was to be accepted in place of that provided for by the Timber Slide Company's Act, and to be acted upon by the Commissioner in fixing the schedule of tolls.

Held, affirming the judgment of the Court of Appeal for Ontario, that the above grounds of impeachment were covered by the consent judgment and were *res judicata*.

Held, further, that plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the Commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited.

By R. S. O. (1887) c. 160, s. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation it should forfeit all its corporate and other powers, unless further time were granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the Commissioner of Public Works.

Semble, the non-completion of the works within two years would not *ipso facto*, forfeit, the charter, but only afford grounds for proceedings by the Attorney-General to have a forfeiture declared.

Another ground of objection to the imposition of tolls was that the Commissioner, in acting on the report of the valuator appointed under the consent judgment erroneously based the schedule of tolls upon the report as to expenditure instead of as to actual value, and the statement of claim asked that the schedule be set aside and a new scale of tolls fixed.

Held, that under the statute the schedule could only be altered or varied by the Commissioner and the court could not interfere, especially as no application for relief had been made to the Commissioner.

Hardy Lumber Co. v. *Pickerel River Improvement Co.*, 14th December, 1898 .. xxix.

COMPOSITION AND DISCHARGE.

Debtor and Creditor—Acquiescence in—New Arrangement of Terms of Settlement—Waiver of Time Clause—Principal and Agent—Deed of Discharge—Notice of Withdrawal from Agreement — Fraudulent Preferences.

Upon default to carry out the terms of a deed of composition and discharge a new arrangement was made respecting the realization of a debtor's assets, and their distribution, to which all the executing creditors appeared to have assented.

Held, that a creditor who had benefited by the realization of the assets and by his action given the body of the creditors reason to believe that he had adopted the new arrangement, could not repudiate the transaction upon the ground that the new arrangement was not fully understood, without at least a surrender of the advantage he had received through it. The debtor's assent to such repudiation and the grant of better terms to the one creditor would be a fraud upon the other creditors, and as such inoperative and of no effect.

Howland, Sons & Co. v. *Grant* — xxvi., 372

CONDITIONS AND WARRANTIES.

1.—Life Insurance—Conditions and Warranties—Indorsements on Policy—Inaccurate Statements — Misrepresentations — Latent Disease — Material Facts — Cancellation of Policy — Return of Premium—Construction of Statute—55 Vic. c. 39, s. 33 (Ont.).

The provisions of the second sub-section of section thirty-three of "The Insurance Corporations Act, 1892," (Ont.) limiting con-

ditions and warranties, indorsed on policies, providing for the avoidance of the contract by reason of untrue statements in the applications to cases where such statements are material to the contract, do not require the materiality of the statements to appear by the indorsements, but the contract will be avoided only when such statements may subsequently be judicially found to be material as provided by the third sub-section.

Misrepresentations upon an application for life insurance so found to be material will avoid the policy notwithstanding that they may have been made in good faith and in the conscientious belief that they were true. *Venner* v. *The Sun Life Insurance Company* (17 Can. S. C. R. 394), followed.

Jordan et al. v. *Provincial Provident Institution* .. .. xxviii., 554

2.—Fire Insurance—Condition in Policy—Notice of Additional Insurace—Duty of Insured.

A policy of insurance against fire contained a condition requiring notice of insurances existing at the time the policy issued or afterwards made on the same property, and that a memorandum thereof should be indorsed on the policy, otherwise that the policy should be void, a proviso being added that the company should have the option to cancel the policy, or, if it remained in force with their consent, then the company to be liable only for rateable proportion of loss or damage. Insured applied for additional insurance while this policy was in force, on 10th July, 1895, in another company, and on 17th July his application was accepted, but notice of acceptance did not reach him until the 20th. The insured property was destroyed by fire on the 18th July, and the company refused payment on the ground that the policy was void for want of notice of the additional insurance, and indorsement thereof, as required by the condition.

Held, affirming the judgment of the Supreme Court of New Brunswick, that the policy was not avoided; that the condition did not require the insured to give notice of insurance of which he had no knowledge, but only covered the case of insurance effected before a loss of which notice could be given, also before loss.

The Commercial Union Insurance Co. v. *Temple*, 21st November, 1898 .. .. .. xxix.

CONDITION PRECEDENT.

Accident Insurance—Condition in Policy—Notice—Action.

See Insurance, Accident, 2.

CONFUSION OF RIGHTS.

Compensation — Judicial Abandonment — Composition and Discharge.

See Abandonment, 1.

CONSTABLE.

1.—The Criminal Code, s. 575—Persona Designata—Officers de facto and de jure—Chief Constable—Common Gaming House—Confiscation of Gaming Instruments, Moneys, Etc.—Evidence—The Canada Evidence Act, 1893, ss. 2, 3, 20 and 21.

Section 575 of the Criminal Code, authorizing the issue of a warrant to seize gaming implements on the report of "the chief constable or deputy chief constable" of a city or town, does not mean that the report must come from an officer having the exact title mentioned, but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the City of Montreal. Girouard, J., dissenting.

The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable though he was not such *de jure*.

O'Neil v. *Attorney-General of Canada*, xxvi., 122

2. — Canada Temperance Act — Search Warrant—Magistrate's Jurisdiction — Justification of Ministerial Officer—Goods in Custodia Legis—Replevin—Estoppel — Res Judicata — Judgment inter partes.

See Canada Temperance Act, 2.

CONSTITUTIONAL LAW.

1.—Title to Lands in Railway Belt in British Columbia—Unsurveyed Lands held under Pre-emption — Record Prior to Statutory Conveyance to Dominion Government—Federal and Provincial Rights—British Columbia Lands Acts of 1873 and 1879—47 Vic. c. 6 (D.).

On 10th Sept., 1883, D. *et al.* obtained a certificate of pre-emption under the British Columbia Land Act, 1875, and Land Amendment Act, 1879, of 640 acres of unsurveyed lands within the 20 mile belt south of the C. P. R., reserved on the 29th Nov., 1883, under an agreement between the two Governments of the Dominion and of the Province of British Columbia, and which

was ratified by 47 Vic. c. 14 (B. C.). On 29th Aug., 1885, this certificate was cancelled, and on the same day a like certificate was issued to respondents, and on the 31st July, 1889, letters-patent under the great seal of British Columbia were issued to respondents. By the agreement ratified by 47 Vic. c. 6 (D.), it was also agreed that three and a half million additional acres in Peace River District should be conveyed to the Dominion Government in satisfaction of the right of the Dominion under the terms of union to have made good to it, from public lands contiguous to the railway belt, the quantity of land that might at the date of the conveyance be held under pre-emption right of the Dominion under the terms of tion by the Attorney-General for Canada to recover possession of the 640 acres:

Held, affirming the judgment of the Exchequer Court, that the land in question was exempt from the statutory conveyance to the Dominion Government, and that upon the pre-emption right granted to D. *et al.* being subsequently abandoned or cancelled, the land became the property of the Crown in right of the province, and not in right of the Dominion.

The Queen v. *Demers* .. .. .. xxii., 482

2.—Territorial Rights—Exercise of—Territorial or Prerogative Rights—Beneficial Interest—Great Seal—Suits by Dominion Government—Exchequer Court—Jurisdiction.

The Crown in right of the Dominion has a right to take proceedings to restrain an individual from making use of a provincial grant in a way to embarrass the Dominion in the exercise of its territorial rights.

The rights of the Crown, territorial or prerogative, are to be passed under the Great Seal of the Dominion or province (as the case may be), in which is vested the beneficial interest therein.

The Parliament of Canada has the right to enact that all actions and suits of a civil nature at common law or equity, in which the Crown in right of the Dominion is plaintiff or petitioner, may be brought in the Exchequer Court. Taschereau, J., *dubitante*.

Farwell v. *The Queen* .. .. .. xxii., 553

3.—Manitoba Constitutional Act—33 Vic. c. 3, s. 22, s.-s. 2—Powers of Provincial Legislature in Matters of Education—Rights and Privileges—Legislative Power to Repeal Previous Statutes—Right of Appeal to Governor-General in Council—B. N. A. Act (1867), s. 93, s.-s. 3.

Section 22 of the Manitoba Act, 33 Vic. c. 3 (D.), enacts: "In and for the province the said legislature may exclusively make laws in relation to education, subject and according to the following provisions:—(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the province at the union. (2) An appeal shall lie to the Governor-General in Council from any act or decision of the Legislature of the province, or of any provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education." Sub-section 3 of section 93 of the British North America Act (1867), enacts: (3) "Where in any province a system of separate or dissentient schools exists by law of the union, or it is thereafter established by the Legislature of the province, an appeal shall lie to the Governor-General in Council from any act or decision of any provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

By certain statutes of the Province of Manitoba relating to education, passed in 1871 and subsequent years, the Catholic minority of Manitoba enjoyed up to 1890 immunity from taxation for other schools than their own, etc., etc., but by the Public Schools Act, 53 Vic. c. 38 (1890) these Acts were repealed and the Roman Catholics were made liable by assessment for the public schools which are non-denominational, but were left free to send their children to the public schools.

On a petition and memorials sent to the Governor-General in Council by the Catholic minority, alleging that rights and privileges in the matter of education secured to them since the union had been affected, and praying for relief under sub-secs. 2 and 3 of sec. 22 of the Manitoba Act, 1871, a special case was submitted to the Supreme Court of Canada, and it was:

Held, 1. That the said rights and privileges in the matter of education, being rights and privileges which the Legislature of Manitoba had itself created, and there being no clear express and unequivocal words in sec. 22 of the Manitoba Act, 1871, restricting the constitutional right of the Legislature of the province to repeal the laws it might itself enact in relation to education, no right of appeal lies to the Governor-General in Council as claimed either under sub-sec. 2 of sec. 22 of the Manitoba Act, or sub-sec. 3 of sec. 93 of the British North America Act, 1867. Fournier and King, JJ., contra.

2. That the right to appeal given by sub-sec. 2 of sec. 22 of the Manitoba Act is only from an Act or decision of the Legislature, which might affect any rights or privileges existing at the time of the union as mentioned in sub-sec. 1, or of any provincial, executive or administrative authorities affecting any right or privilege existing at the time of the union. Fournier and King, JJ., dissenting.

Per Taschereau and Gwynne JJ., that the decision in *Barrett* v. *Winnipeg* ([1892] A. C. 443), disposes of and concludes the present application.

Quære—Per Taschereau, J. Is section 4 of 54 & 55 Vic. c. 25, which purports to authorize such a reference for hearing "or" consideration, *intra vires* of the Parliament of Canada?

In re Statutes of Manitoba, Education xxii., 577

MEMO.—See (1895) A. C. 202.

4.—FORESHORE OF HARBOUR—PROPERTY IN —44 VIC. C. 1, S. 18 (D.)—AUTHORITY TO RAILWAY COMPANY TO USE FORESHORE—JUS PUBLICUM — ACCESS TO PUBLIC HARBOUR.

The Dominion Statute, 44 Vic. c. 1, s. 18, gave the C. P. R. Co. the right to take and use the land below high water mark in any stream, lake, etc., so far as required for the purposes of the railway.

Held, that the right of the public to have access to a harbour, the foreshore of which had been taken by the company under this Act, was subordinate to the rights given to the company thereby, and the latter could prevent by injunction an interference with the use of the foreshore so taken.

City of Vancouver v. *The Canadian Pacific Railway Co.* .. .. xxiii., 1

5.—BRITISH NORTH AMERICA ACT, SS. 65, 92 —PARDONING POWER OF LIEUTENANT-GOVERNORS—51 VIC. C. 5 (O.)—ACT RESPECTING THE EXECUTIVE ADMINISTRATION OF THE LAWS OF THE PROVINCE —PROVINCIAL PENAL LEGISLATION.

The Local Legislatures have the right and power to impose punishments by fine and imprisonment as sanction for laws which they have power to enact.

The Lieutenant-Governor of a province is as much the representative of Her Majesty the Queen for all purposes of provincial government as the Governor-General himself is for all purposes of the Dominion Government.

Inasmuch as the Act 51 Vic. c. 5 (O.) declares that in matters within the jurisdiction of the Legislature of the province all powers, etc., which were vested in or exercisable by the Governors or Lieutenant-Governors of the several provinces before Confederation shall be vested in and exercisable by the Lieutenant-Governor of that province, if there is no proceeding in dispute which has been attempted to be justified under 51 Vic. c. 5 (O.), it is impossible to say that the powers to be exercised by the said Act by the Lieutenant-Governor are unconstitutional.

Quære—Is the power of conferring by legislation upon the representative of the Crown, such as a Colonial Governor, the prerogative of pardoning in the Imperial Parliament only or, if not, in what legislature does it reside?

Gwynne, J., dissenting, was of opinion that 51 Vic. c. 5 (O.), is *ultra vires* of the Provincial Legislature.

Attorney-General of Canada v. *Attorney-General of Ontario* .. .. xxiii., 458

6.—51 & 52 VIC. C. 91, SS. 9, 14 (Q.)—INTERPRETATION ACT, S. 19 R. S. Q.—RAILWAY SUBSIDY—DISCRETIONARY POWER OF LIEUTENANT-GOVERNOR IN COUNCIL—PETITION OF RIGHT—MISAPPROPRIATION OF SUBSIDY MONEYS BY ORDER IN COUNCIL.

Where money is granted by the Legislature and its application is prescribed in such a way as to confer a discretion upon the Crown, no trust is imposed enforceable against the Crown by petition of right.

The appellant railway company alleged by petition of right that by virtue of 51 & 52 Vic. c. 91, the Lieutenant-Governor in Council was authorized to grant 4,000 acres of land per mile for 30 miles of the Hereford Railway; that by an order in council dated 6th August, 1888, the land subsidy was converted into a money subsidy, the 9th section, of said cap. 91 of 51 & 52 Vic., enacting that "it shall be lawful," etc., to convert; that the company completed the construction of their line of railway, relying upon the said subsidy and Order in Council, and built the railway in accordance with the Act 51 & 52 Vic., c. 91, and the provisions of the Railway Act of Canada, 51 Vic. c. 29, and they claimed to be entitled to the sum of $49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded *inter alia*, that the money had been paid by Order in Council to the subcontractors for work necessary for the construction of the road; that the president had

by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties, and signed a receipt for the balance of $6,500 due on account of the first subsidy. The petition of right was dismissed.

Held, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company enforceable by petition of right (Taschereau and Sedgewick, JJ., dissenting), but assuming it did, the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy, and payment by the Crown of the sub-contractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy.

Hereford Ry. Co. v. *The Queen* .. xxiv., 1

7.—Local Option Act—53 Vic. c. 56, s. 18 (O.)—54 Vic. c. 46 (O.)—Constitutionality—Prohibition by Retail—Powers of Local Legislatures.

The statute 53 Vic. c. 56, s. 18 (O.) allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors is *intra vires* the Ontario Legislature, as is also sec. 1 of 54 Vic. c. 46, which explains it, but the prohibition can only extend to sale by retail. *In re Local Option Act* (18 Ont. App. R. 572) approved. Gwynne and Sedgewick, JJ., dissenting.

Huson v. *The Municipal Council of the Corporation of the Township of South Norwich*, xxiv., 145

8.—Reference by Governor in Council—Constitutional Law — Prohibitory Laws—Intoxicating Liquors—British North America Act, ss. 91 and 92—Provincial Jurisdiction—53 Vic. c. 56, s. 18 (O.)—54 Vic. c. 46 (O)—Local Option — Canada Temperance Act, 1878.

A Provincial Legislature has not jurisdiction to prohibit the sale, either by wholesale or retail, within the province, of spirituous, fermented or other intoxicating liquors.

Per Strong, C.J., and Fournier, J., dissenting: A provincial Legislature has jurisdiction to prohibit the sale within the province of such liquors by retail, but not by wholesale; and if any statutory definition of the terms wholesale and retail be required, legislation for such purpose is vested in the Dominion as appertaining to the regulation of trade and commerce.

A Provincial Legislature has not jurisdiction to prohibit the manufacture of such liquors within, or their importation into, the province.

The Ontario Legislature had not jurisdiction to enact the 18th section of the Act 53 Vic. c. 56, as explained by 54 Vic. c. 46. The Chief Justice and Fournier, J., dissenting.

In re Prohibitory Liquor Laws .. xxiv., 170

Memo.—See (1896) A. C. 348.

9.—Dominion Government—Liability to Action for Tort—Injury to Property on Public Work—Non-feasance—39 Vic. c. 27 (D.)—R. S. C. c. 40, s. 6—50 & 51 Vic. c. 16 (D.).

50 & 51 Vic. c. 16, ss. 16 and 58 confers upon the subject a new or enlarged right to maintain a petition of right against the Crown for damages in respect of a tort (Taschereau, J., expressing no opinion on this point).

By 50 & 51 Vic. c. 16, s. 16 (D.), the Exchequer Court is given jurisdiction to hear and determine *inter alia*: "(c) Every claim against the Crown arising out of any death or injury to the person, or to the property, on any public work, resulting from the negligence of any officer or servant of the Crown for damages in respect of a tort (Tasduties or employment; (d) Every claim against the Crown arising under any law of Canada." * * * In 1877 the Dominion Government, became possessed of the property in the City of Quebec, on which the Citadel is situated. Many years before that a drain had been constructed through this property by the Imperial authorities, the existence of which was not known to the officers of the Dominion Government, and it was not discovered at an examination of the premises in 1880 by the City Engineer of Quebec and others. Before 1877 this drain had become choked up, and the water escaping gradually loosened the earth, until, in 1889, a large portion of the rock fell from the cliff into a street of the city below, causing great damage, for which compensation was claimed from the Government.

Held, per Taschereau, Gwynne and King, JJ., affirming the decision of the Exchequer Court, that as the injury to the property of the city did not occur upon a public work, sub-sec. (c) of the above Act did not make the Crown liable, and, moreover, there was no evidence that the injury was caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

Held, per Strong, C.J., and Fournier, J., that while sub-sec. (*c*) of the Act did not apply to the case, the city was entitled to relief under sub-sec. (*d*); that the words "any claim against the Crown" in that sub-sec., without the additional words, would include a claim for a tort; that the added words "arising under any law of Canada" do not necessarily mean any prior existing law or statute law of the Dominion, but might be interpreted as meaning the general law of any province of Canada, and even if the meaning be restricted to the statute law of the Dominion, the effect of sec. 58 of 50 & 51 Vic. c. 16 is to reinstate the provision contained in sec. 6 of the repealed Act R. S. C. c. 40, which gives a remedy for injury to property in a case like the present; that this case should be decided according to the law of Quebec, regulating the rights and duties of proprietors of land situated on different levels; and that under such law the Crown, as proprietor of land on the higher level, was bound to keep the drain thereon in good repair, and was not relieved from liability for damage caused by neglect to do so by the ignorance of its officers of the existence of the drain.

Held, also, per Strong, C.J., and Fournier, J., that independently of the enlarged jurisdiction conferred by 50 & 51 Vic. c. 16 the Crown would be liable to damages for the injury complained of, not as for tort but for a breach of its duty as owner of the superior heritage, by altering its natural state to the injury of the inferior proprietor.

City of Quebec v. *The Queen* .. .. xxiv., 420

10.—Construction of Statute—British North America Act, ss. 112, 114, 115, 116, 118—36 Vic. c. 30 (D.)—47 Vic. c. 4 (D.)—Provincial Subsidies—Half-yearly Payments—Deduction of Interest.

By section 111 of the British North America Act, Canada is made liable for the debt of each province existing at the union. By sec. 112, Ontario and Quebec are jointly liable to Canada for any excess of the debt of the Province of Canada at the time of the union over $62,500,000, and chargeable with 5 per cent. interest thereon; secs. 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick exceeding eight and seven million dollars respectively; and by sec. 116, if the debts of those provinces should be less than said amounts they are entitled to receive, by half-yearly payments, in advance, interest at the rate 5 per cent. on the difference. Section 118, after providing for annual payments of fixed sums to the several provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada, and shall be paid half-yearly, in advance, to each province, but the Government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act." The debt of the Province of Canada at the union exceeded the sum mentioned in sec. 112.

On appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the Provinces of Ontario and Quebec.

Held, affirming said award, that the subsidy of the provinces under sec. 118 was payable from the 1st of July, 1867, but interest on the excess of debt should not be deducted until 1st January, 1868; that unless expressly provided interest is never to be paid before it accrues due; and that there is no express provision in the British North America Act that interest shall be deducted in advance on the excess of debt under sec. 118.

By 36 Vic. c. 30 (D.), passed in 1873, it was declared that the debt of the Province of Canada at the union was then ascertained to be $73,006,088.84, and that the subsidies should thereafter be paid according to such amount. By 47 Vic. c. 4, in 1884, it was provided that the accounts between the Dominion and the provinces should be calculated as if the last mentioned Acts had directed that such increase should be allowed from the coming into force of the British North America Act, and it also provided that the total amount of the half-yearly payments which would have been made on account of such increase from July 1st, 1867, to January 1st, 1873, with interest at 5 per cent. from the day on which it would have been so paid to July 1st, 1884, should be deemed capital owing to the respective provinces, bearing interest at 5 per cent., and payable after July 1st, 1884, as part of the yearly subsidies.

Held, affirming the said award, Gwynne, J., dissenting, that the last mentioned Acts did not authorize the Dominion to deduct interest in advance from the subsidies payable to the provinces half-yearly, but leaves such deduction as it was under the British North America Act.

Dominion of Canada v. *Provinces of Ontario and Quebec* .. .. xxiv., 498

11.—Powers of Executive Councillors—"Letter of Credit"—Ratification by Legislature—Obligations binding on the Province—Discretion of the Government as to the Expenditures—Petition of Right—Negotiable Instrument—"Bills of Exchange Act, 1890"—The Bank Act," R. S. C. c. 120.

The Provincial Secretary of Quebec wrote the following letter to D., with the assent of his colleagues, but not being authorized by Order in Council:—"J'ai l'honneur de vous informer que le gouvernement fera voter, dans le budget supplémentaire de 1891-92, un intem de six mille piastres qui vous seront payées immédiatement aprés la session, et cela à titre d'acompte sur l'impression de la 'Liste des terres de la Couronne, concédées depuis 1763 jusqu'au 31 décembre 1890,' dont je vous ai confié l'impression dans une lettre en date du 14 Janvier, 1891. Cette somme de six mille piastres sera payée au porteur de la présente lettre, revêtue de votre endossement." D. indorsed the letter to a bank as security for advances to enable him to do the work.

Held, affirming the judgment of the Court of Queen's Bench, that the letter constitutued no contract between D. and the Government; that the Provincial Secretary had no power to bind the Crown by his signature to such a document; and that a subsequent vote of the Legislature of a sum of money for printing "liste des terres de la Couronne," etc., was not a ratification of the agreement with D., the Government not being obliged to expend the money though authorized to do so, and the vote containing no reference to the contract with D., nor to the said letter of credit.

Held, also, that a bank cannot deal in such securities as the said letter of credit which is dependent on the vote of the Legislature, and therefore not a negotiable instrument within the Bills of Exchange Act of 1890, or the Bank Act, R. S. C. c. 120, ss. 45 and 60.

The Jacques Cartier Bank v. *The Queen*, xxv., 84

12.—Powers of Provincial Legislatures—Direct Taxation—Manufacturing and Trading Licenses—Distribution of Taxes—Uniformity of Taxation—55 & 56 Vic. c. 10 and 56 Vic. c. 15 (Q.)—British North America Act, 1867.

The provisions of the Quebec statute, 55 & 56 Vic. c. 10, as amended by 56 Vic. c. 15, do not involve a regulation of trade and commerce, and the license fee thereby imposed is a direct tax, and *intra vires* of the Legislature. The license required to be taken out by the statute is merely an incident to the collection of the tax, and does not alter its character.

Where a tax has been imposed by competent legislative authority, the want of uniformity or equality in the apportionment of the tax is not a ground sufficient to justify the courts in declaring it unconstitutional. *Bank of Toronto* v. *Lambe* (12 App. Cas. 575), followed. *Attorney-General* v. *The Queen Insurance Co.* (3 App. Cas. 1090), distinguished.

Fortier v. *Lambe* .. .. xxv., 422

13.—Province of Canada—Treaties with Indians—Surrender of Indian Lands—Annuity to Indians—Revenue from Lands—Increase of Annuity—Charge upon Lands—B. N. A. Act, s. 109.

In 1850 the late Province of Canada entered into treaties with the Indians of the Lake Superior and Lake Huron districts, by which the Indian lands were surrendered to the government of the province in consideration of a certain sum paid down and an annuity to the tribes, with a provision that "should all the territory hereby ceded by the Indians at any future period produce such an amount as will enable the govenment of this province, without incurring loss, to increase, the annuity hereby secured to them, then, and in that case, the same shall be augmented from time to time." By the B. N. A. Act the Dominion of Canada assumed the debts and liabilities of the Province of Canada, and sec. 109 of that Act provided that all lands, etc., belonged to the several provinces in which the same were situate "subject to any trust existing in respect thereof, and to any interest other than that of the province in the same." The lands so surrendered are situate in the Province of Ontario, and have for some years produced an amount sufficient for the payment of an increased annuity to the Indians. The Dominion Government has paid the annuities since 1867 (from 1874, at the increased amount), and claims to be reimbursed therefor.

Held, reversing the said award, Gwynne and King, JJ., dissenting, that the provision in the treaties as to increased annuities had not the effect of burdening the lands with a "trust in respect thereof" or "an interest other than that of the province in the same," within the meaning of said sec. 109, and therefore Ontario held the lands free from any trust or interest, and was not solely liable for repayment to the Dominion of the increased annuities, but only liable jointly

with Quebec as representing the Province of Canada.

Ontario v. *Canada and Quebec. In re Indian Claims* .. .. xxv., 434

(Affirmed by Privy Council).

14.—Municipal Corporation—Powers of Legislature — License — Monopoly — Highways and Ferries — Navigable Streams—By-laws and Resolutions—Intermunicipal Ferry — Tolls — Disturbance of Licensee — North-west Territories Act, R. S. C. c. 50, ss. 13 and 24—B. N. A. Act, s. 92, s.-s. 8, 10, and 16—Rev. Ord. N. W. T. (1888) c. 28—N. W. Ter. Ord. No. 7 of 1891-92, s. 4.

The authority given to the Legislative Assembly of the North-West Territories, by R. S. C. c. 50, and Orders in Council thereunder, to legislate as to "municipal institutions" and "matters of a local and private nature" (and perhaps as to license for revenue), within the Territories includes the right to legislate as to ferries.

The town of Edmonton, by its charter, and by "The Ferries Ordinance," (Rev. Ord. N. W. T. (1888) c. 28), can grant the exclusive right to maintain a ferry across a navigable river which is not within the territorial limits of the municipality; and as under the charter the powers vested in the Lieutenant-Governor in Council by the Ferries Ordinance are transferred to the municipality, such right may be conferred by license and a by-law is not necessary.

A "club" or partnership styled "The Edmonton Ferry Company" was formed for the purpose of building, establishing and operating a ferry within the limits assigned in the license by the municipality granting exclusive rights to ferry across the river in question, the conditions being that any person could become a member of the club by signing the list of membership, and taking at least one share of $5 therein, which share entitled the signer to 100 tickets that were to be received in payment of ferry service according to a prescribed tariff, and when expended could be renewed by further subsciptions for shares *ad infinitum*. The club supplied their ferryman with a list of membership, and established and operated their ferry, without any license, within a short distance of one of the licensed ferries, thereby, as was claimed, disturbing the licensee in his exclusive rights.

Held, that the establishment of the club ferry and the use thereof by members and others under their club regulations was an infringement of the rights under the license, and that the licensee could recover damages by reason of such infringement.

Dinner et al. v. *Humberstone* .. xxvi., 252

15.—Navigable Waters—Title to Bed of Stream — Crown — Dedication of Public Lands—Presumption of Dedication—User—Obstruction of Navigation—Public Nuisance—Balance of Convenience.

The title to the soil in the beds of navigable rivers is in the Crown in right of the provinces, not in right of the Dominion. *Dixson* v. *Snetsinger* (23 U. C. C. P. 235), discussed.

The property of the Crown may be dedicated to the public, and a presumption of dedication will arise from facts sufficient to warrant such an inference in the case of a subject.

By 23 Vic. c. 2, s. 35 (Can.), power was given to the Crown to dispose of and grant water lots in rivers and other navigable waters in Upper Canada, and the power to grant the soil carried with it the power to dedicate it to the public use.

The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication. If a province before confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation, the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.

An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance though of very great public benefit, and the obstruction of the slightest possible degree.

The Queen v. *Moss* .. .. .. xxvi., 322

16.—Marital Rights—Married Woman—Separate Estate — Jurisdiction of North-west Territorial Legislature —Statute—Interpretation of—40 Vic. c. 7, s. 3, and Amendments—R. S. C. c. 50—N. W. Ter. Ord. No. 16 of 1889.

The provisions of Ordinance No. 16 of 1889, respecting the personal property of married women, are *intra vires* of the Legislature of the North-West Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorized to legislate by the order of

the Governor-General in Council passed under the provisions of "The North-West Territories Act."

The provisions of said Ordinance No. 16 are not inconsistent with sections 36 to 40 inclusively of "The North-West Territories Act," which exempt from liability for her husband's debts the personal earnings and business profits of a married woman.

The words "her personal property" used in the said Ordinance No. 16, are unconfined by any context, and must be interpreted not as having reference only to the "personal earnings" mentioned in sec. 36, but to all the personal property belonging to a woman, married subsequently to the Ordinance, as well as to all the personal property acquired since then by women married before it was enacted. *Brittlebank* v. *Gray-Jones* (5 Man. L. R. 33), distinguished.

Conger v. *Kennedy* .. .. xxvi., 397

17.—Canadian Waters—Property in Beds — Public Harbours — Erections in Navigable Waters — Interference with Navigation—Rights of Fishing—Power to Grant—Riparian Proprietors—Great Lakes and Navigable Rivers—Operation of Magna Charta —Provincial Legislation — R. S. O. (1887) c. 24, s. 47—55 Vic. (O.), c. 10, ss. 5 to 13, 19 and 21—R. S. Q. Arts. 1375 to 1378.

The beds of public harbours not granted before Confederation are the property of the Dominion of Canada. *Holman* v. *Green* (6 Can. S. C. R. 707), followed.

The beds of all other waters not so granted belong to the respective provinces in which they are situate, without any distinction between the various classes of waters.

Per Gwynne, J. The beds of all waters are subject to the jurisdiction and control of the Dominion Parliament, so far as required for creating future harbours, erecting beacons or other public works for the benefit of Canada under the British North America Act, s. 92, item 10, and for the administration of the fisheries.

R. S. C. c. 92, "An Act respecting certain works constructed in or over navigable rivers," is *intra vires* of the Dominion Parliament.

The Dominion Parliament has power to declare what shall be deemed an interference with navigation, and to require its sanction to any work in navigable waters.

A province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse or the like, and the grantee on obtaining the sanction of the Dominion may build thereon subject to compliance with R. S. C. c. 92.

Riparian proprietors before Confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. *Robertson* v. *The Queen* (6 Can. S. C. R. 52), followed.

The rule that riparian proprietors own *ad medium filum aquæ* does not apply to the great lakes or navigable rivers.

Where beds of such waters have not been granted the right of fishing is public, and not restricted to waters within the ebb and flow of the tide.

Where the provisions of Magna Charta are not in force, as in the Province of Quebec, the Crown in right of the province may grant exclusive rights of fishing in tidal waters, except in tidal public harbours in which, as in public harbours, the Crown in right of the Dominion may grant the beds and fishing rights. Gwynne, J., dissenting.

Per Strong, C.J., and King and Girouard, JJ. The provisions of Magna Charta relating to tidal waters would be in force in the provinces in which such waters exist (except Quebec) unless repealed by legislation, but such legislation has probably been passed by the various provincial Legislatures; and these provisions of the charter so far as they affect public harbours have been repealed by Dominion Legislation.

The Dominion Parliament cannot authorize the giving by lease, license or otherwise the right of fishing in non-navigable waters, nor in navigable waters, the beds and banks of which are assigned to the provinces under the British North America Act.

The legislative authority of Parliament under section 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries under which it may require that no person shall fish in public waters without a license from the Department of Marine and Fisheries, may impose fees for such license, and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally from fishing. The license as required will, however, be merely personal conferring qualification, and give no exclusive right to fish in a particular locality.

Section 4 and other portions of Revised Statutes of Canada, c. 95, so far as they attempt to confer exclusive rights of fishing in provincial waters, are *ultra vires*. Gwynne, J., contra.

Per Gwynne, J. Provincial Legislatures have no jurisdiction to deal with fisheries. Whatever comes within that term is given to the Dominion by the British North America Act, section 91, item 12, including the grant of leases or licenses for exclusive fishing.

Per Strong, C.J., Taschereau, King and Girouard, JJ. R. S. O. c. 24, s. 47, and ss. 5 to 13 and 19 to 21 of the Ontario Act of 1892, are *intra vires*, but may be superseded by Dominion legislation—R. S. Q. Arts. 1375 to 1378 are also *intra vires*.

Per Gwynne, J. R. S. O. c. 24, s. 47, is *ultra vires* so far as it assumes to authorize the land covered with water within public harbours.

The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection against interference with navigation.

The Act of 1892 and R. S. Q. arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are *ultra vires*.

In re Jurisdiction over Provincial Fisheries, xxvi., 444

18.—Convention of 1818—Construction of Treaty—Construction of Statute—Fisheries — Three Mile Limit — Foreign Fishing Vessels—"Fishing"—59 Geo. III., c. 38 (Imp.)—R. S. C. cc. 94 & 95.

Where fish had been enclosed in a seine more than three marine miles from the coast of Nova Scotia and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of bailing the fish out of the seine;

Held, Strong, C.J., and Gwynne, J., dissenting, affirming the decision of the court below, that the vessel when so seized was "fishing" in violation of the convention of 1818, between Great Britain and the United States of America and of the Imperial Act 59 Geo. III., c. 38, and the Revised Statutes of Canada, c. 94, and consequently liable with her cargo, tackle, rigging, apparel, furniture and stores to be condemned and forfeited.

The ship "Frederick Gerring, Jr." v. *The Queen* .. .. xxvii., 271

19.—Criminal Code, ss. 275, 276—Bigamy Canadian Subject Marrying Abroad—Jurisdiction of Parliament.

Sections 275 and 276 of the Criminal Code, 1892, respecting the offence of bigamy, are *intra vires* of the Parliament of Canada. Strong, C.J., *contra*.

The Criminal Code, 1892, Sections Relating to Bigamy .. .. xxvii., 461

20.—B. N. A. Act, s. 142—Award of 1870, Validity of—Upper Canada Improvement Fund—School Fund—B. N. A. Act, s. 109—Trust Created by—Effect of Confederation on Trust.

The arbitrators appointed in 1870, under s. 142 of the B. N. A. Act, were authorized to "divide" and "adjust" the accounts in dispute between the Dominion of Canada and the Provinces of Ontario and Quebec, respecting the former Province of Canada. In dealing with the Common School Fund established under 12 Vic. c. 200 (Can.), they directed the principal of the fund to be retained by the Dominion and the income therefrom to be paid to the provinces.

Held, that even if there was no ultimate "division and adjustment," such as the statute required, yet the ascertainment of the amount was a necessary preliminary to such "division and adjustment," and therefore *intra vires* of the arbitrators.

Held, further, that there was a division of of the beneficial interest in the fund, and a fair adjustment of the rights of the provinces in it which was a proper exercise of the authority of the arbitrators under the statute.

By 12 Vic. c. 200, s. 3 (Can.), one million acres of the public lands of the Province of Canada were to be set apart to be sold, and the proceeds applied to the creation of the "Common School Fund," provided for in section one. The lands so set apart were all in the present Province of Ontario.

Held, that the trust in these lands created by the Act for the Common Schools of Canada did not cease to exist at Confederation, so that the unsold lands and proceeds of sales should revert to Ontario, but such trust continued in favour of the Common Schools of the new Provinces of Ontario and Quebec.

In the agreement of reference to the arbitrators appointed under Acts passed in 1891 to adjust the said accounts questions respecting the Upper Canada Improvement Fund were excluded, but the arbitrators had to determine and award upon the accounts as rendered by the Dominion to the two provinces up to January, 1889.

Held, that the arbitrators could pass upon the right of Ontario to deduct a proportion of the schools lands, the amount of which was one of the items in the accounts so rendered.

The Province of Ontario and the Province of Quebec v. *The Dominion of Canada. In re Common School Fund and Lands* .. xxviii., 609

CONTEMPT OF COURT.

APPEAL — JURISDICTION — CRIMINAL PROCEEDING—FINAL JUDGMENT—R. S. C. c. 135, s. 68.

Contempt of Court is a criminal proceeding, and unless it comes within s. 68 of the Supreme Court Act, an appeal does not lie to this Court from a judgment in proceedings therefor. *O'Shea* v. *O'Shea* (15 P. D. 59), followed; *In re O'Brien* (16 Can. S. C. R. 197), referred to. In proceedings for contempt of court by attachment until sentence is pronounced there is no "final judgment" from which an appeal could be brought.

Ellis v. *The Queen* .. .. xxii., 7

CONTRACT.

1.—CONSTRUCTION OF AGREEMENT—WAY—REMOVAL OF TIMBER—NECESSARY.

The plaintiff was the owner of a farm, of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land under an agreement which provided, among other things, that the purchaser should have "full liberty to enter into and upon the said lands for the purpose of removing the trees and timber, at such times and in such manner as he may think proper," but reserved to the plaintiff the full enjoyment of the land "save and in so far as may be necessary for the cutting and removing of the trees and timber." To have removed the timber through the wooded land at the time it was removed, would have involved an expenditure which would have possibly amounted to a sacrifice of the greater portion of the timber.

Held, affirming the judgment of the court below, that the defendants had a right to remove the timber by the most direct and available route, provided they acted in good faith and not unreasonably, and the reservation in favour of the plaintiff did not minimize or modify the defendant's right, under the general grant of the trees, to remove the trees across the cleared land. Gwynne, J., dissenting.

Stephens v. *Gordon* .. .. xxii., 61

2.—SALE OF LAND—BUILDING RESTRICTIONS — DESCRIPTION — STREET BOUNDARIES — CONSTRUCTION OF COVENANT.

The owners of a block of land in Toronto, bounded on the north by Wellesley Street and west by Sumach Street, entered into an agreement with B., whereby the latter agreed to purchase a part of said block, which was vacant wild land, not divided into lots, and containing neither buildings nor streets, though a by-law had been passed for the construction of a street immediately south of it to be called Amelia Street. The agreement contained certain restrictions as to buildings to be erected on the property purchased, which fronted on the two streets north and west of it respectively, and the vendors agreed to make similar stipulations in any sale of land on the south side of Wellesley Street, produced. A deed was afterwards executed of said land pursuant to the agreement which contained the following covenant: "And the grantors * * covenant with the grantees * * that in case they make sale of any lots fronting on Wellesley Street or Sumach Street on that part of lot 1, in the City of Toronto, situate on the south side of Wellesley Street and east of Sumach Street, now owned by them, that they will convey the same subject to the same building agreements or conditions" (as in the agreement). The vendors afterwards sold a portion of the remaining land fronting on Amelia Street, and one hundred feet east of Sumach Street, and the purchaser being about to erect thereon a building forbidden by the restrictive covenant in the deed, B. brought an action against his vendors for breach of said covenant, claiming that it extended to the whole block.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the covenant included all the property south of Wellesley Street; that the land not being divided into lots any part of it was a portion of a lot of land fronting on Wellesley and Sumach Streets, and so within the purview of the deed; and that the vendors could not by dividing the property as they saw fit narrow the operation and benefit of their own deed.

Held, affirming the decision of the Court question did not front nor abut on either Wellesley or Sumach Streets, but on Amelia Street alone, and was not, therefore, literally within the covenant of the vendors.

Dumoulin v. *Burfoot* .. .. .. xxii., 120

3.—SALE OF DEALS—CONTRACT—BREACH OF — DELIVERY—ACCEPTANCE — QUALITY — WARRANTY AS TO — DAMAGES — ARTS. 1073, 1473, 1507 C. C.

In a contract for the purchase of deals from A. by S. *et al.* merchants in London, it was stipulated, *inter alia*, as follows:—"Quality—Sellers guarantee quality to be equal to the usual Etchemin Stock, and to be marked with the Beaver Brand," and the

mode of delivery was f. o. b. vessels at Quebec, and payment by drafts, payable in London 120 days sight from date of shipment. The deals were shipped at Quebec on board vessels owned by P. & Bros., at the request of P. & P., intending purchasers of the deals. When the deals arrived in London they were inspected by S. *et al.*, and found to be of inferior quality, and S. *et al.*, after protesting sold them at reduced rates.

In an action in damages for breach of contract;

Held, reversing the judgment of the court below, that the delivery was to be at Quebec, subject to an acceptance in London, and that the purchasers were entitled to recover under the express warranty as to quality, there being abundant evidence that the deals were not of the agreed quality. Strong, C.J., and Sedgewick, J., dissenting.

Stewart v. *Atkinson* .. .. .. xxii., 315

4.—Conveyance—Illegal or Immoral Consideration—Intention of Grantor—Character of Grantee—Pleading.

A contract for transfer of property with intent by the transferer, and for the purpose, that it shall be applied by the transferee to the accomplishment of an illegal or immoral purpose is void and cannot be enforced; but mere knowledge of the transferor of the intention of the transferee so to apply it will not void the contract unless, from the particular nature of the property, and the character and occupation of the transferee, a just inference can be drawn that the transferor must also have so intended.

Judgment of the Court of Appeal affirmed, Taschereau, J., dissenting.

Clark v. *Hagar* .. .. xxii., 510

5.—Petition of Right—46 Vic. c. 27 (Q.)—Final Certificate of Engineer—Extras—Practice as to Plea in Bar not set up.

A contract entered into between Her Majesty the Queen, in right of the Province of Quebec, and S. X. Cimon for the construction of three of the departmental buildings at Quebec, contained the usual clauses that the balance of the contract price was not payable until a final certificate by the engineer in charge was delivered, showing the total amount of work done, and materials furnished, and the cost of extras and the reduction in the contract price upon any alterations. There was a clause providing for the final decision by the Commissioner of Public Works, in matters in dispute upon the taking over or settling for the works. The Commissioner of Public Works, after hearing the parties, gave his decision that nothing was due to the contractors, and the engineer in charge, by his final certificate, declared that a balance of $31.36 was due upon the contract price, and $42.84 on extras. The suppliants by their petition of right claimed *inter alia* $70,000 due on extras. The Crown pleaded general denial and payment. The Superior Court granted the suppliants $74.20, the amount declared to be due under the final certificate of the engineer. On appeal the Court of Queen's Bench for Lower Canada (appeal side) increased the amount to $13,198.77, with interest and costs.

Held, reversing the judgment of the court below, and restoring the judgment of the Superior Court, that the suppliants were bound by the final certificate given by the engineer under the terms of the contract.

Per Fournier and Taschereau, JJ., dissenting, that as the final certificate had not been set up in the pleadings as a bar to the action, and there was an admission of record by the Crown that the contractor was entitled to 20 per cent. commission on extras ordered and received, the evidence fully justified the finding of the Court of Queen's Bench that the commission of 20 per cent. was still due and unpaid on $65,837.09 of said extra work.

The Queen v. *Cimon* .. .. .. xxiii., 62

6.—Construction of Contract — Street Railway — Permanent Pavements — Arbitration and Award.

The Toronto Street Railway Company was incorporated in 1861, and its franchise was to last thirty years, at the expiration of which period the City Corporation could assume the ownership of the railway and property of the company on payment of the value thereof, to be determined by arbitration. The company was to keep the roadway between the rails, and for eighteen inches outside each rail paved and macadamized and in good repair, using the same material as that on the remainder of the street, but if a permanent pavement should be adopted by the corporation the company was not bound to construct a like pavement between the rails, etc., but was only to pay the cost price of the same, not to exceed a specified sum per yard. The City Corporation laid upon certain streets traversed by the company's railway permanent pavements of cedar blocks, and issued debentures for the whole cost of such works. A by-law was then passed, charging the company with

its portion of such costs in the manner and for the period that adjacent owners were assessed, under the Municipal Act for local improvements. The company paid the several rates assessed up to the year 1886, but refused to pay for subsequent years, on the ground that the cedar block pavement had proved to be by no means permanent, but defective and wholly insufficient for streets upon which the railway was operated. An action having been brought by the city for these rates, it was held that the company was only liable to pay for permanent roadways, and a reference was ordered to determine, among other things, whether or not the pavements laid by the city were permanent. This reference was not proceeded with, but an agreement was entered into by which all matters in dispute to the end of the year 1888 were settled, and thereafter the company was to pay a specific sum annually per mile in lieu of all claims on account of debentures maturing after that date, and "in lieu of the company's liability for construction, renewal, maintenance and repair in respect of all the portions of streets occupied by the company's track so long as the franchise of the company to use the said streets *now* extends." The agreement provided that it was not to affect the rights of either party in respect to the arbitration to be had if the city took over the railway, nor any matters not specifically dealt with therein, and it was not to have any operation "beyond the period over which the aforesaid franchise now extends." This agreement was ratified by an Act of the Legislature passed in 1890, which also provided for the holding of the said arbitration, which having been entered upon the city claimed to be paid the rates imposed upon the company for construction of permanent pavements for which debentures had been issued payable after the termination of the franchise. The arbitrators having refused to allow this claim, an action was brought by the city to recover the said amount.

Held, affirming the decision of the Court of Appeal, that the claim of the city could not be allowed; that the said agreement discharged the company from all liability in respect to construction, renewal, maintenance and repair of the said streets; and that the clause providing that the agreement should not affect the rights of the parties in respect to the arbitration, etc., must be considered to have been inserted *ex majori cautela* and could not do away with the express contract to relieve the company from liability.

Held, further, that by an Act passed in 1877, and a by-law made in pursuance thereof, the company was only assessable as for local improvements, which, by the Municipal Act, constitute a lien upon the property assessed, but not a personal liability upon the owners or occupiers after they have ceased to be such; therefore after the termination of the franchise the company would not be liable for these rates.

The City of Toronto v. *The Toronto Street Ry. Co.* .. .. xxiii., 198

7.—Electric Plant—Reference to Experts by Court—Adoption of Report by two Courts—Appeal on Question of Fact—Arbitration Clause in Contract—Right of Action.

The Royal Electric Company having sued the City of Three Rivers for the contract price of the installation of a complete electric plant, which, under the terms of the contract, was to be put in operation for at least six weeks before payment of the price could be claimed, the court referred the case to experts on the question whether the contract had been substantially fulfilled, and they found that owing to certain defects the contract had not been satisfactorily completed. The Superior Court adopted the finding of fact of the experts, and dismissed the action. The Court of Queen's Bench for Lower Canada (appeal side), on an appeal affirmed the judgment of the Superior Court.

On an appeal to the Supreme Court of Canada:

Held, affirming the judgments of the courts below, that it being found that the appellants had not fulfilled their contracts within the delay specified, they could not recover.

Held, also, that when a contract provides that no payment shall be due until the work has been satisfactorily completed a claim for extras, made under the contract, will not be exigible prior to the completion of the main contract.

Quære: Whether a right of action exists although a contract contains a clause that all matters in dispute between the parties shall be referred to arbitration. *Quebec Street Railway Company* v. *City of Quebec* (10 Q. L. R. 305), referred to.

Royal Electric Co. v. *Corporation of Three Rivers* .. .. xxiii., 289

8.—Action en Garantie—Contract—Sub-contract—Legal Connection (Connexite).

The appellants, who had a contract with the City of Three Rivers, to supply and set up a complete electric plant, sub-let to the respondents the part of their engagement

which related to the steam engine and boilers. The original contract with the City of Three Rivers embraced conditions of which the defendants had no knowledge, and included the supply of other totally different plant from that which they subsequently undertook to supply to the appellants. The appellants, upon completion of the works, having sued the City of Three Rivers for the agreed contract price, the city pleaded that the work was not completed, and set up defects in the steam engine and boilers, and the appellants thereupon brought an action *en garantie simple* against the respondents.

Held, affirming the judgment of the courts below, that there was no legal connexion (*connexité*) existing between the contract of the defendant and that of the plaintiffs with the City of Three Rivers, upon which the principal demand was based, and therefore the action *en garantie simple* was properly dismissed.

Royal Electric Co. v. *Leonard* .. xxiii., 298

9.—Interest in Mine—Agreement to Transfer Portion of Proceeds of Sale—Statute of Frauds.

An agreement by the owner of an interest in a gold mine to transfer to another, in consideration of services performed in working the mine, a portion of such owner's share in the proceeds when it was sold is not a contract for sale of an interest in land within the Statute of Frauds.

Stuart v. *Mott* .. .. xxiii., 384

10.—Contract—Public Work—Authority of Government Engineer to vary Terms—Delay.

Under a contract with the Dominion Government for building a bridge, the specification of which called for timber of a special kind, which the contractor could only procure in North Carolina, the Government was not obliged, in the absence of a special provision therefor, to have such timber inspected at that place, and was not bound by the act of the Government Engineer in agreeing to such inspection, the contract containing a clause that no change in its terms would be binding on the Crown, unless sanctioned by Order in Council.

A provision that the contractor should have no claim against the Crown by reason of delay in the progress of the work arising from the acts of any of Her Majesty's servants, was also an answer to a suit by the contractor for damages caused by delay in having the timber inspected.

Mayes v. *The Queen* .. .. .. xxiii., 454

11.—Crown Domain—Disputed Territory—License to cut Timber—Implied Warranty of Title—Breach of Contract—Damages.

The claimant applied to the Government of Canada for licenses to cut timber on ten timber berths, situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant should pay certain ground-rents and bonuses, make surveys and build a mill. The claimant knew of the dispute which was at the time open and public. He paid the rents and bonuses, made the surveys and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada, at the time six leases or licenses were current, and consequently the Government could not renew them. The leases were granted under sections 49 and 50 of 46 Vic. c. 17, and the regulations made under the Act of 1879, provided that "the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council."

In a claim for damages by the licensee:—

Held, 1. Orders in Council issued pursuant to 46 Vic. c. 17, ss. 49 and 50, authorizing the Minister of the Interior to grant licenses to cut timber did not constitute contracts between the Crown and proposed licensees, such Orders in Council being revocable by the Crown until acted upon by the granting of licenses under them.

2. The right of renewal of the licenses was optional with the Crown, and the claimant was entitled to recover from the Government only the moneys paid to them for ground rents and bonuses.

Bulmer v. *The Queen* .. .. .. xxiii., 488

12.—Sale of Goods by Sample—Place of Inspection—Delivery—Sale Through Brokers—Agency—Acquiescence.

Where goods are sold by sample the place of delivery is, in the absence of a special agreement to the contrary, the place for inspection by the buyer, and refusal to inspect there when opportunity therefor is afforded is a breach of the contract to purchase.

Evidence of mercantile usage will not be allowed to add to or affect the construction of a contract for sale of goods unless such custom is general. Evidence of usage in Canada will not affect the construction of a contract for sale of goods in New York by parties domiciled there, unless the latter are

shown to have been cognizant of it, and can be presumed to have made their contract with reference to it.

If parties in Canada contract to purchase goods in New York through brokers, first by telegram and letters, and completed by exchange of bought and sold notes, signed by the brokers, the latter may be regarded as agents of the purchasers in Canada; but if not, if the purchasers make no objection to the form of the contract, or to want of authority in the brokers, and after the goods arrive refuse to accept them on other grounds, they will be held to have ratified the contract.

Trent Valley Woollen Mfg. Co. v. *Oelrichs*, xxiii., 682

13.—Contract of Sale—Contre Lettre—Principal and Agent — Construction of Contract.

A sale of property was controlled by a writing in the nature of a *contre lettre*, by which it was agreed as follows: "the vendor in consideration of the sum of $2,940 makes and executes this day a clear and valid deed in favour of the purchaser of certain property (therein described), and the purchaser for the term of three years is to let the vendor have control of the said deeded property, to manage as well, safely and properly as he would if the said property was his own, and bargain and sell the said property for the best price that can be had for the same, and pay the rent, interest and purchase money when sold, and all the avails of the said property to the purchaser to the amount of $2,940, and interest at the rate of eight per cent. per annum from the date of these presents, and then the said purchaser shall re-deed to the vendor any part of the said property that may remain unsold after receiving the aforesaid amount and interest." The vendor was at the time indebted to the purchaser in the sum of $2,941. The two documents were registered. The vendor had other properties, and gave the purchaser a power of attorney to convey all his real estate in the same locality. The term of three years mentioned in the *contre lettre* was continued by mutual consent. The vendor subsequently paid amounts on account of his general indebtedness to the purchaser. It was only after the purchaser's death that the vendor claimed from the heirs of the purchaser the balance, above mentioned, of $1,470, as owing to him for the management of his properties.

Held, reversing the judgment of the Court of Queen's Bench, and restoring the judgment of the Superior Court, that the proper construction of the contract was to be gathered from both documents and dealings of the parties, and that the property having been deeded merely as security it was not an absolute sale, and that plaintiff was not purchaser's agent in respect of this property.

Held, also, that the only action plaintiff had was the *actio mandata contraria* with a tender of his *reddition de compte*.

Hunt v. *Taplin* .. .. xxiv., 36

14.—Specific Performance — Agreement to Perform Services—Relationship of Parties.

M., on his father's death, at the age of three years, went to live with his grandfather W. who sent him to school until he was sixteen years old, and then took him into his store where he continued as the sole clerk for eight or nine years, when W. died and M. died a few days later. Both having died intestate, the administratrix of M.'s estate brought an action against the representatives of W., for the value of such services rendered by M., and on the trial there was evidence of statements made by W. during the time of such service to the effect that if he (W.) died without having made a will M. would have good wages, and if he made a will he would leave the business and some other property to M.

Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that there was sufficient evidence of an agreement between M. and W., that the services of the latter were not to be gratuitous, but were to be remunerated by payment of wages, or a gift by will to overcome the presumption to the contrary arising from the fact that W. stood *in loco parentis* towards M. There having been no gift by will the estate of W. was therefore liable for the value of the services as estimated by the jury. *McGugan* v. *Smith* (21 Can. S. C. R. 263), followed.

Murdoch v. *West* .. .. xxiv., 305

15.—Construction of Deed — Sale of Phosphate Mining Rights—Option to Purchase other Minerals Found While Working—Transfer of Rights.

M. by deed sold to W. the phosphate mining rights of certain land, the deed containing a provision that "in case the said purchaser in working the said mines should find other minerals of any kind he shall have the privilege of buying the same from the said vendor or representative by paying the price set upon the same by two arbitrators, appointed by the parties." W. worked the

phosphate mines for five years, and then discontinued it. Two years later he sold his mining rights in the land, and by various conveyances they were finally transferred to B., each assignment purporting to convey "all mines, minerals and mining rights already found or which may hereafter be found" on said land. A year after the transfer to B. the original vendor, M., granted the exclusive right to work mines and veins of mica on said land to W. & Co., who proceeded to develop the mica. B. then claimed an option to purchase the mica mines, under the original agreement, and demanded an arbitration to fix the price, which was refused, and she brought an action to compel M. to appoint an arbitrator and for damages.

Held, affirming the decision of the Court of Queen's Bench, that the option to purchase other minerals could only be exercised in respect to such as were found when actually working the phosphate, which was not the case with the mica, as to which B. claimed the option.

Baker v. *McLelland* .. .. .. xxiv., 416

16.—Construction of Agreement to Discontinue Business—Determination of Agreement.

B., a manufacturer of glassware, entered into a contract with two companies in the same trade, by which, in consideration of certain quarterly payments, he agreed to discontinue his business for five years. The contract provided that if at any time during the five years any furnace should be started by other parties for the manufacture of glassware, either of the said companies could, if it wished, by written notice to B., terminate the agreement "as on the first day on which glass has been made by the said furnace," and the payments to B. should then cease, unless he could show "that said furnace or furnaces at the time said notice was given could not have a production of more than one hundred dollars per day.

Held, affirming the decision of the Court of Review, that under this agreement B. was only required to show that any furnace so started did not have an actual output worth more than $100 per day on an average for a reasonable period, and that the words "could not have a production of more than one hundred dollars per day" did not mean mere capacity to produce that quantity whether it was actually produced or not.

North American Glass Co. v. *Barsalou*, xxiv., 490

17.—Railway Co.—Carriage of Goods—Carriage over Connecting Lines—Contract for—Authority of Agent.

E., in Br. Col., being about to purchase goods from G. in Ont., signed, on request of the freight agent of the Northern Pacific Railway Company in British Columbia, a letter to G. asking him to ship goods via Grand Trunk Railway and Chicago & N. W. care Northern Pacific Railway at St. Paul. This letter was forwarded to the freight agent of the Northern Pacific Railway Company at Toronto, who sent it to G., and wrote to him "I enclose you card of advice and if you will kindly fill it up when you make the shipment send it to me, I will trace and hurry them through, and advise you of delivery to consignee." G. shipped the goods as suggested in this letter, deliverable to his own order in British Columbia.

Held, affirming the decision of the Court of Appeal, that on arrival of the goods at St. Paul the Northern Pacific Railway Company was bound to accept delivery of them for carriage to British Columbia and to expedite such carriage; that they were in the care of said company from St. Paul to British Columbia; that the freight agent at Toronto had authority so to bind the company; and that the company was liable to G. for the value of the goods which were delivered to E. at British Columbia without an order from G., and not paid for.

Northern Pacific Ry. Co. v. *Grant*, xxiv., 546

18. — Insurance Co. — Appointment of Medical Examiner—Breach of Contract—Authority of Agent.

The medical staff of the Equitable Life Assurance Society at Montreal consists of a medical referee, a chief medical examiner and two or more alternate medical examiners. In 1888 L. was appointed an alternate examiner in pursuance of a suggestion to the manager by local agents that it was advisable to have a French Canadian on the staff. By his commission L. was entitled to the privilege of such examinations as should be assigned to him by, or required during the absence, disability or unavailability of the chief examiner. After L. had served for four years it was found that his methods in holding examinations were not acceptable to applicants, and he was requested to resign, which he refused to do, and another French Canadian was appointed as an additional alternate examiner, and most of the applicants thereafter went to the latter. L. then brought an action against

the company for damages by loss of the business and injury to his professional reputation by refusal to employ him, claiming that on his appointment the general manager had promised him all the examinations of French Canadian applicants for insurance. He also alleged that he had been induced to insure his own life with the company on the understanding that the examination fees would be more than sufficient to pay the premiums, and he asked for repayment of amounts paid by him for such insurance.

Held, affirming the decision of the Court of Queen's Bench, that by the contract made with L. the company were only to send him such cases as they saw fit, and could dismiss him or appoint other examiners at their pleasure; that the manager had no authority to contract with L. for any employment other than that spcified in his commission; and that he had no right of action for repayment of his premiums, it being no condition of his employment that he should insure his life, and there being no connection between the contract for insurance and that for employment.

Laberge v. *The Equitable Life Assurance Society* .. .. xxiv., 595

19.—Sale of Timber—Delivery—Time for Payment—Premature Action.

By agreement in writing, I. agreed to sell and the V. H. L. Co. to purchase timber to be delivered "free of charge where they now lie within ten days from the time the ice is advised as clear out of the harbour so that the timber may be counted. * * * Settlement to be finally made inside of thirty days in cash, less 2 per cent. for the dimension timber which is at John's Island.

Held, affirming the decision of the Court of Appeal, that the last clause did not give the purchaser thirty days after delivery for payment; that it provided for delivery by vendor and payment by purchasers within thirty days from the date of the contract; and that if purchasers accepted the timber after the expiration of thirty days from such date, an event not provided for in the contract, an action for the price could be brought immediately after the acceptance.

Victoria Harbour Lumber Co. v. *Irwin*, xxiv., 607

20.—Contract—Building of Engine and Boiler — Time for Completion — Damages—Construction of Contract.

The action was for the contract price of building an engine and boiler for defendants (appellants), and the defence was that the work was not done within the time provided for in the contract, and that defendants were entitled to deduct $20 a day for each day's default in completion, as the agreement allowed, the balance being paid into court. The trial judge held plaintiffs entitled to recover, finding that the delay was occasioned by defendants, but he deducted a small amount as damages for delay for a time attributable to plaintiffs. The Divisional Court reversed this judgment and dismissed the action. The Court of Appeal for Ontario (21 Ont. App. R. 160), restored the original judgment, and allowed plaintiffs the amount deducted at the trial.

The Supreme Court of Canada affirmed the judgment appealed from, being of opinion that the delay was caused by the defendants themselves, and that the Court of Appeal rightly held plaintiffs entitled to recover the full contract price.

The French River Tug Co. v. *The Kerr Engine Co.*, 11th March, 1895 .. .. .. xxiv., 703

21.—Correspondence—Carriage of Goods —Transportation Co.—Carriage over Connecting Lines—Bill of Lading.

Where a court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of what has passed between the parties must be taken into consideration. *Hussey* v. *Horne-Payne* (4 App. Cas. 311), followed.

A shipping agent cannot bind his principal by receipt of a bill of lading after the vessel containing the goods shipped has sailed, and the bill of lading so received is not a record of the terms on which the goods are shipped.

Where a shipper accepts what purports to be a bill of lading, under circumstances which would lead him to infer that it forms a record of the contract of shipment, he cannot usually, in the absence of fraud or mistake, escape from its binding operation merely upon the ground that he did not read it, but that conclusion does not follow where the document is given out of the usual course of business and seeks to vary terms of a prior mutual assent.

Taschereau, J., dissented on the ground that the correspondence in the case did not contain the contract relied on, and that the injury to the goods for which the action was brought took place while they were not under the control of the company.

The North-west Transportation Co. v. *McKenzie* .. .. xxv., 38

22. — Constitutional Law — Powers of Executive Councillors—"Letter of Credit" — Ratification by Legislature—Obligations Binding on the Province—Discretion of the Government as to the Expenditure—Petition of Right—Negotiable Instrument—"Bills of Exchange Act, 1890" —"The Bank Act," R. S. C. c. 120.

The Provincial Secretary of Quebec wrote the following letter to D., with the assent of his colleagues, but not being authorized by Order in Council: "J'ai l'honneur de vous informer que le gouvernement fera voter, dans le budget supplémentaire de 1891-92, un item de six mille piastres qui vous seront payées immédiatement après la session, et cela à titre d'accompte sur l'impression de la 'Liste des terres de la Couronne concédées depuis 1763 jusqu'au 31 décembre 1890,' dont je vous ai confié l'impression dans une lettre en date du 14 janvier 1891." "Cette somme de six mille piastres sera payée au porteur de la présente lettre, revêtue de votre endossement." D. indorsed the letter to a bank as security for advances to enable him to do the work.

Held, affirming the judgment of the Court of Queen's Bench, that the letter constituted no contract between D. and the Government; that the Provincial Secretary had no power to bind the Crown by his signature to such a document; and that a subsequent vote of the legislature of a sum of money for printing "liste des terres de la Couronne," etc., was not a ratification of the agreement with D., the Government not being obliged to expend the money though authorized to do so, and the vote containing no reference to the contract with D., nor to the said letter of credit.

The Jacques Cartier Bank v. *The Queen*, xxv., 84

23.—Insurance Against Fire—Mutual Insurance Company—Notice Rejecting Application—Statutory Conditions—R. S. O. (1887) c. 167—Waiver—Estoppel—Evidence.

B. applied to a mutual company for insurance on his property for four years, giving an undertaking to pay the amounts required from time to time and a four months' note for the first premium. He received a receipt beginning as follows: "Received from B. an undertaking for the sum of $46.50, being the premium for an insurance to the extent of $1,500 on the property described in his application of this date," and then providing that the company could cancel the contract at any time within fifty days by notice mailed to the applicant, and that non-receipt of a policy within the fifty days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B., and no policy was issued within the said time, which expired on March 4th, 1891. On April 17th, B. received a letter from the manager asking him to remit funds to pay his note maturing on May 1st. He did so and his letter of remittance crossed another from the manager, mailed at Owen Sound, April 20th, stating the rejection of his application and returning the undertaking and note. On April 24th the insured property was destroyed by fire. B. notified the manager by telegraph, and on April 29th the latter wrote returning the money remitted by B., who afterwards sent it again to the manager, and it was again returned. B. then brought an action, which was dismissed at the hearing, and a new trial ordered by the Divisional Court and affirmed by the Court of Appeal.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that there was a valid contract by the company with B. for insurance for four years; that the statutory conditions in the Ontario Insurance Act (R. S. O. [1887] c. 167), governed such contract though not in the form of a policy; that if the provision as to non-receipt of a policy within fifty days was a variation of the statutory conditions, it was ineffectual for non-compliance with condition 115, requiring variations to be written in a different coloured ink from the rest of the document, and if it had been so printed the condition was unreasonable; and that such provision, though the non-receipt of the policy might operate as a notice, was inconsistent with condition 19, which provides that notice shall not operate until seven days after its receipt.

Held, also, that there was some evidence for the jury that the company, by demanding and receiving payment of the note, had waived the right to cancel the contract, and were estopped from denying that B. was insured.

The Dominion Grange Mutual Fire Assurance Association v. *Bradt* .. .. .. xxv., 154

24.—Construction of Contract—Inconsistent Conditions — Dismissal of Contractor — Architect's Powers—Arbitrator — Disqualification —Probable Bias—Rejection of Evidence—Judge's Discretion as to Order of Evidence.

A contract for the construction of a public work contained the following clause: "In case the works are not carried on with such

expedition and with such materials and workmanship as the architect or clerk of the works may deem proper the architect shall be at liberty to give the contractors ten days notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract (except so far as inconsistent herewith), in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows: In case the works from the want of sufficient or proper workmen or materials are not proceeding with all the necessary despatch, then the architect may give ten days' notice to do what is necessary, and upon the contractor's failure to do so, the architect shall have the power at his discretion (with the consent in writing of the Court House Committee, or Commission as the case may be), without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractor."

Held, Sedgewick and Girouard, JJ., dissenting, that this last clause was inconsistent with the above clause of the contract, and that the latter must govern. The architect therefore had power to dismiss the contractor without the consent in writing of the Committee.

At the trial, the plaintiff tendered evidence to show that the architect had acted maliciously in the rejection of materials, but the trial judge required proof to be first adduced tending to show that the materials had been wrongfully rejected, reserving until that fact should be established the consideration of the question whether malice was necessary to be proved, and if necessary what evidence would be sufficient to establish it. Upon this ruling plaintiff declined to offer any further evidence, and thereupon judgment was entered for the defendants.

Held, that this ruling did not constitute a rejection, but was merely a direction as to the marshalling, of evidence within the discretion of the trial Judge.

Neelon v. *The City of Toronto* .. xxv., 579

25.—Principal and Agent—Master and Servant—Insurance Agent — Duty — Appointment—Acting for Rival Company—Divided Interests—Dismissal.

To act as agent for a rival insurance company is a breach of an insurance agent's agreement, "to fulfil conscientiously all the duties assigned to him, and to act constantly for the best interest of his employer," and is sufficient justification for his dismissal.

Judgment of the Court of Appeal for Ontario (22 Ont. App. R. 408), affirmed.

Eastmure v. *The Canada Accident Assurance Co.*, 22nd February, 1896 .. .. xxv., 691

26.—Bailees—Common Carriers—Express Company—Receipt for Money Parcel — Conditions Precedent — Formal Notice of Claim—Pleading—Money had and Received—Special Pleas.

Where an express company gave a receipt for money to be forwarded with the condition endorsed that the company should not be liable for any claim in respect of the package, unless within sixty days of loss or damage a claim should be made by written statement, with a copy of the contract annexed.

Held, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver the parcel to the consignee. *Richardson* v. *Canada West Farmers' Ins. Co.* (16 U. C. C. P. 430), distinguished.

In an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted," put in issue all material facts necessary to establish the plaintiff's right of action.

The Northern Pacific Express Co. v. *Martin et al.* .. .. xxvi., 135

27.—Statute of Frauds—Memorandum in Writing—Repudiating Contract by.

A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo, under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale.

Martin v. *Haubner* .. .. xxvi., 142

28.—Contract—Subsequent Deed—Inconsistent Provisions.

C., by agreement of April 6th, 1891, agreed to sell to the Erie County Gas Co., all his gas grants, leases and franchises, the company agreeing, among other things, to "reserve gas enough to supply the plant now operated or to be operated by them on said property." On April 20th, a deed was executed and delivered to the company transferring all the leases and property specified

in said agreement, but containing no reservation in favour of C. such as was contained therein. The Erie Company, in 1894, assigned the property transferred by said deed to the Provincial Natural Gas and Fuel Co., who immediately cut off from the works of C. the supply of gas, and an action was brought to prevent such interference.

Held, affirming the decision of the Court of Appeal, that as the contract between the parties was embodied in the deed subsequently executed the rights of the parties were to be determined by the latter instrument, and as it contained no reservation in favour of C. his action could not be maintained.

Carroll et al. v. *The Provincial Natural Gas and Fuel Company of Ontario* .. .. xxvi., 181

29.—Public Work—Progress Estimates—Engineer's Certificate—Revision by Succeeding Engineer—Action for Payment on Monthly Certificate.

A contract with the Crown for building locks and other work on a government canal provided for monthly payments to the contractors of 90 per cent. of the value of the work done, at the prices named in a schedule annexed to the contract, such payments to be made on the certificate of the engineer, approved by the Minister of Railways and Canals, that the work certified for had been executed to his satisfaction, the certificate so approved was to be a condition precedent to the right of the contractors to the monthly payments, and the remaining 10 per cent. of the whole of the work was to be retained until its final completion; the engineer was to be the sole judge of the work and materials, and his decision on all questions with regard thereto, or as to the meaning and intention of the contract, was to be final; and he was to be at liberty to make any changes or alterations in the work which he should deem expedient.

Held, that though the value of the work certified to by the monthly certificates was only approximate and subject to revision on completion of the whole, yet where the engineer in charge had changed the character of a particular class of work, and when completed had classified it and fixed the value, his decision was final and could not be reopened and revised by a succeeding engineer.

Held, also, that the contractors could proceed by action if payment on a monthly certificate was withheld, and were not obliged to wait the final completion of the work before suing.

Murray v. *The Queen* .. .. .. xxvi., 203

30.—Resolutory Condition—Conditional Sale—Arts. 379, 2017, 2083, 2085, 2089 C. C.—Hypothecary Creditor—Unpaid Vendor—Property Real and Personal—Immovables by Destination—Movables Incorporated with the Freehold—Severance from Realty.

An action was brought by L. to revendicate an engine and two boilers under a resolutory condition (*condition resolutoire*) contained in a written agreement providing that, until fully paid for, they should remain the property of L., and that all payments on account of the price should be considered as rent for their use, and further that, upon default, L. should have the right to resume possession and remove the machinery. The machinery in question had previously been imbedded in foundations in a sawmill which had been sold separately to the defendants, and at the time of the agreement the boilers were still attached to the building, but the engine had been taken out and was lying in the mill-yard, outside of the building. While in this condition the defendants hypothecated the mill property to B., and the hypothecs were duly registered. The engine was subsequently replaced in the building and used for some time in connection with the boilers for the purpose of running the mill. The agreement respecting the engine and boilers was not registered. B. intervened in the action of revendication and claimed that the machinery formed part of the freehold and was subject to his hypothecs upon the lands.

Held, that the agreement between L. and the defendants could not be considered a lease, but was rather a sale subject to a resolutory condition with a clause of forfeiture as regards the payments made on account. But whether the agreement was a lease or a sale on condition, L. having, as respects the boilers and their accessories, consented to their incorporation with the immovable, and dealt with them while so incorporated, they became immovables by destination within the terms of article 379 of the Civil Code, and subject to the duly registered hypothecs of the respondent. *Wallbridge* v. *Farwell* (18 Can. S. C. R. 1), followed.

Lainé et al. v. *Béland* .. .. xxvi., 419

31.—Fire Insurance—Conditions in Policy—Breach—Waiver—Recognition of Existing Risk after Breach—Authority of Agent.

A policy of fire insurance on a factory and machinery contained a condition making

it void if the said property was sold or conveyed, or the interest of the parties therein changed.

Held, affirming the decision of the Supreme Court of New Brunswick, that by a chattel mortgage given by the assured on said property his interest therein was changed and the policy forfeited under said condition.

Held, further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach.

Torrop v. *The Imperial Fire Assurance Co.*, xxvi., 585

32. — Railway Company — Carriage of Goods — Connecting Lines — Special Contract—Loss by Fire in Warehouse—Negligence—Pleading.

In an action by S., a merchant at Merlin, Ont., against the Lake Erie and Detroit River Ry. Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G. T. R. Co., and the rest to the C. P. R. and other companies, by the said several companies to be, and the same were, transferred to the Lake Erie, etc., Co., for carriage to Merlin, and that on receipt by the Lake Erie Company of the goods it became their duty to carry them safely to Merlin, and deliver them to S. There was also an allegation of a contract by the Lake Erie for storage of the goods and delivery to S. when requested, and of lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co at Merlin.

Held, reversing the decision of the Court of Appeal, that as to the goods delivered to the G. T. R. Co. to be transferred to the Lake Erie Co., as alleged, if the cause of action stated was one arising *ex delicto* it must fail, as the evidence showed that the goods were received from the G. T. R. Co. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G. T. R. Co. to the consignors, and if it was a cause of action founded on contract it must also fail as the contract under which the goods were received by the G. T. R. Co., provided among other things, that the company would not be liable for the loss of goods by fire: that goods stored should be at sole risk of the owners: and that the provisions should apply to and for the benefit of every carrier.

Held, further, that as to the goods delivered to the companies other than the G. T. R. Co. to be transferred to the Lake Erie Co., the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the G. T. R. Co., giving subsequent carriers the benefit of their provisions; and that as the two courts below had held that the loss was caused by the negligence of servants of the Lake Erie Co., such finding should not be interfered with.

Held, also, that as to goods carried on a bill of lading issued by the Lake Erie Co., there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one as the company only undertakes to warehouse goods of necessity and for convenience of shippers.

The Lake Erie and Detroit River Railway Company v. *Sales et al.* .. .. .. xxvi., 663

33.—Oral Agreement in Variation of Written Contract—Consideration.

The defendant had agreed in writing to accept certain goods in payment of two bills of exchange accepted by the plaintiff, and plaintiff, having delivered the goods in payment of such bills, was subsequently sued by an indorsee of one of them, and compelled to pay it. In an action to recover the amount so paid by the plaintiff, the defendant offered evidence to shew that at the time the agreement in writing was made, the plaintiff orally agreed that the goods should not be taken as payment in full of the bills, and that he would pay the balance as soon as he was able. It was held by the Supreme Court of Nova Scotia, that such agreement, if made, was void for want of consideration (28 N. S. Rep. 210).

On appeal to the Supreme Court of Canada the judgment was affirmed.

Cox v. *Seeley*, 6th May, 1896.

34.—Sale by Sample—Objections to Invoice — Reasonable Time — Acquiescence—Evidence.

If a merchant receives an invoice and retains it for a considerable time without making any objection, there is a presumption against him that the price stated in the invoice was that agreed upon. (Judgment of the Court of Queen's Bench, that the evidence was sufficient to rebut the presumption, reversed).

Gwynne, J., dissented, holding that the appeal depended on mere matters of fact as to which an Appellate Court should not interfere.

Kearney v. *Letellier* .. .. xxvii., 1

35.—Agreement in Writing—Municipal Corporation — Waterworks —Extension of Works — Repairs — By-law — Resolution — Injunction — Highways and Streets—R. S. Q. Art. 4485—Art. 1033*a*, C. C. P.

By a resolution of the Council of the Town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and to lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the river Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time, and completed in the year 1892. He constructed a system of waterworks, and had it in operation within the time prescribed, but the system proving insufficient a company was formed in 1895 under the provisions of R. S. Q., art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir, and to make new excavations in the streets for these purposes without receiving any further authority from the council.

Held, reversing the judgment appealed from, (Gwynne, J., dissenting), that these were not merely necessary repairs but new works, actually part of the system required to be completed during the year 1892, and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town.

Held, further, that the resolution and the application upon which it was founded constituted a "contract in writing," and a "written agreement" within the meaning of article 1033*a* of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works.

La Ville De Chicoutimi v. *Legaré*, xxvii., 329

36.—Agreement Respecting Lands—Boundaries — Referee's Decision — Bornage—Arbitrations—Arts. 941-945 and 1341 *et seq.* C. C. P.

The owners of contiguous farms executed a deed for the purpose of settling a boundary line between their lands, thereby naming a third person to ascertain and fix the true division line upon the ground, and agreeing further to abide by his decision, and accept the line which he might establish as correct. On the conclusion of the referee's operations one of the parties refused to accept or act upon his decision, and action was brought by the other party to have the line so established declared to be the true boundary, and to revendicate the strip of land lying upon his side of it.

Held, reversing the judgment of the Court of Queen's Bench, that the agreement thus entered into was a contract binding upon the parties to be executed between them according to the terms therein expressed and was not subject to the formalities prescribed by the Code of Civil Procedure relating to arbitrations.

McGoey v. *Leamy* .. .. xxvii., 545

37.—Contract, Construction of—Public Works—Arbitration—Progress Estimates — Engineer's Certificate — Approval by Head of Department—Condition Precedent.

The eighth and twenty-fifth clauses of the appellant's contract for the construction of certain public works were as follows:—"8. That the engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard to work or material, or as to the meaning or intention of this contract, and the plans, specifications, and drawings shall be final, and no works or extra or additional works or charges shall be deemed to have been executed, nor shall the contractor be entitled to payment for the same, unless the same shall have been executed to the satisfaction of the engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor;" but before the contract was signed by the parties the words "as to the meaning or intention of this contract, and the plans, specifications and drawings" were struck out. "25. Cash payments to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of the contract, will be made to the contractor monthly on the written certificate of the engineer that the work for, or on account of, which the certificate is granted has been duly executed to his satisfaction, and stating the value of such work computed as above mentioned, and upon approval of such certificate by the Minister for the time being, and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninety per cent., or any part thereof."

* * * A difference of opinion arose between the contractor and the engineers as to the quantity of earth in certain embankments which should be paid for at an increased rate as "water-tight" embankment under the provisions of the contract and specifications relating to the works, and the claim of the contractor was rejected by the engineer, who afterwards, however, after the matter had been referred to the Minister of Justice by the Minister of Railways and Canals, and an opinion favourable to the contention of the contractor given by the Minister of Justice, made a certificate upon a progressive estimate for the amount thus in dispute in the usual form, but added after his signature the following words:—"Certified as regards item 5 (the item in dispute), in accordance with the letter of Deputy Minister of Justice, dated 15th January, 1896." The estimate thus certified was forwarded for payment, but the Auditor-General refused to issue a cheque therefor.

Held, that under the circumstances of the case the certificate sufficiently complied with the requirements of the twenty-fifth section of the contract; that the decision by the engineer rejecting the contractor's claim was not a final decision under the eighth clause of the contract adjudicating upon a dispute under said eighth section, and did not preclude him from subsequently granting a valid certificate to entitle the contractor to receive payment of his claim, and that the certificate given in this case whereby the engineer adopted the construction placed upon the contract in the legal opinion given by the Minister of Justice, was properly granted within the meaning of the twenty-fifth clause of the contract. *Murray* v. *The Queen* (26 Can. S. C. R. 203), discussed and distinguished.

Goodwin v. *The Queen* .. .. .. xxviii., 273

38.—Construction of Contract—Construction of Statute—12 Vic. c. 180, s. 20—Notice to Cancel Contract—Gas Supply Shut off for Non-payment of Gas Bill on other Premises—Mandamus.

An agreement to furnish gas contained an express provisions that either of the contracting parties should have the right to cancel the contract by giving twenty-four hours notice in writing. Notices were sent in writing to the consumer that his gas would be shut off at a certain number on a street named, unless he paid arrears of gas bills due upon another property.

Held, that such notices could not be considered as notices given under the contract for the purpose of cancelling it.

Cadieux v. *Montreal Gas Co.* .. xxviii., 382

Note.—In this case leave for appeal from this judgment to the Privy Council was granted (1898) A. C. 718.

39.—Construction of Agreement to Secure Advances—Sale—Pledge—Delivery of Possession—Arts. 434, 1025, 1026, 1027, 1472, 1474, 1492, 1994*c*, C. C.—Bailment to Manufacturer.

K. B. made an agreement with T. for the purchase of the output of his sawmill during the season of 1896, a memorandum being executed between them to the effect that T. sold and K. B. purchased all the lumber that he should saw at his mill during the season, delivered at Hadlow wharf, at Levis; that the purchasers should have the right to refuse all lumber rejected by their culler; that the lumber delivered, culled and piled on the wharf should be paid for at prices stated; that the seller should pay the purchasers $1.50 per hundred deals, Quebec standard, to meet the cost of unloading cars, classification and piling on the wharf; that the seller should manufacture the lumber according to specifications furnished by the purchasers; that the purchasers should make payments in cash once a month for the lumber delivered, less two and a half per cent.; that the purchasers should advance money upon the sale of the lumber on condition that the seller should, at the option of the purchasers, furnish collateral security on his property, including the mill and machinery belonging to him, and obtain a promissory note from his wife for the amount of each cullage, the advances being made on the culler's certificates showing receipts of logs not exceeding $25 per hundred logs of fourteen inches standard; that all logs paid for by the purchasers should be stamped with their name, and that all advances should bear interest at the rate of 7 per cent. Before the river-drive commenced, the logs were culled and received on behalf of the purchasers, and stamped with their usual mark, and they paid for them a total sum averaging $32.33 per hundred. Some of the logs also bore the seller's mark, and a small quantity, which were buried in snow and ice, were not stamped, but were received on behalf of the purchasers along with the others. The logs were then allowed to remain in the actual possession of the seller. During the season a writ of execution issued against the seller, under which all moveable property in his possession was seized, including a quantity of the logs in question,

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lying along the river-drive and at the mill, and also a quantity of lumber into which part of the logs in question had been manufactured, at the seller's mill.

Held (Taschereau, J., taking no part in the judgment upon the merits), that the contract so made between the parties constituted a sale of the logs, and, as a necessary consequence, of the deals and boards into which part of them had been manufactured.

King v. *Dupuis dit Gilbert* . . . . . xxviii., 388

40. — Construction of Statute — Public Works—Railways and Canals—R. S. C. c. 37, s. 23—Contracts Binding on the Crown—Goods Sold and Delivered on Verbal Order of Crown Officials—Supplies in Excess of Tender—Errors and Omissions in Accounts Rendered — Findings of Fact — Interest—Arts. 1067 & 1077 C. C.—50 & 51 Vic. c. 16, s. 33.

The provisions of the twenty-third section of the "Act respecting the Department of Railways and Canals" R. S. C. c. 37), which require all contracts affecting that department to be signed by the Minister, the Deputy Minister or some person specially authorized, and countersigned by the secretary, have reference only to contracts in writing made by that department (Gwynne, J., *contra*).

Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties, payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing. (Gwynne and King, JJ., *contra*).

The Queen v. *Henderson et al.* . . xxviii., 425

41.—Master and Servant—Contract of Hiring — Duration of Service — Evidence—Dismissal—Notice.

Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year is a question of fact to be decided upon the circumstances of the case.

A business having been sold, the foreman, who was engaged for a year, was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but was then informed that if he desired to remain his salary would be considerably reduced. Having refused to accept the reduced salary he was dismissed, and brought an action for damages claiming that his retention for the month was a re-engagement for another year on the same terms.

Held, affirming the judgment of the Court of Appeal (24 Ont. App. R. 296), which reversed that of Meredith, C.J., at the trial (27 O. R. 369), that as it appeared that the foreman knew that the business before the sale had been losing money and could not be kept going without reductions of expenses and salaries, as he had been informed that the contracts with the employees had not been assumed by the purchaser, and as upon his own evidence there was no hiring for any definite period, but merely a temporary arrangement, until the purchaser should have time to consider the changes to be made, the foreman had no claim for damages, and his action was rightly dismissed.

Bain v. *Anderson & Co. et al.* . . xxviii., 481

42. — Insurance, Life — Conditions and Warranties—Indorsements on Policy —Inaccurate Statements — Misrepresentations — Latent Disease — Material Facts—Cancellation of Policy —Return of Premium—Statute, Construction of—55 Vic. c. 39, s. 33 (Ont.).

The provision of the second sub-section of section thirty-three of "The Insurance Corporations Act, 1892," (Ont.), limiting conditions and warranties indorsed on policies providing for the avoidance of the contract by reason of untrue statements in the applications, to cases where such statements are material to the contract, do not require the materiality of the statements to appear by the indorsements, but the contract will be avoided only when such statements may subsequently be judicially found to be material, as provided by the third sub-section.

Misrepresentations upon an application for life insurance so found to be material will avoid the policy notwithstanding that they may have been made in good faith and in the conscientious belief that they were true. *Venner* v. *The Sun Life Insurance Company* (17 Can. S. C. R. 364), followed.

Jordon et al. v. *Provincial Provident Institution* . . . . . xxviii., 554

43.—Vendor and Purchaser—Principal and Agent — Mistake — Contract — Agreement for Sale of Land—Agent Exceeding Authority—Specific Performance—Findings of Fact.

Where the owner of lands was induced to authorize the acceptance of an offer made

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

Murray v. *Jenkins* .. .. .. xxviii., 565

44.—Agreement to Supply Goods—Property in Goods Supplied—Execution—Seizure.

By an agreement between H., of the one part, and W. and wife of the other, the latter were to provide and furnish a store, and H. to supply stock, and replenish same when necessary; W. was to devote his whole time to the business; W. and wife were to make monthly returns of sales and cash balances, quarterly returns of stock, etc., on hand, and to remit weekly proceeds of sales with certain deductions. H. had a right at any time to examine the books and have an account of the stock, etc.; the net profits were to be shared between the parties; the agreement could be determined at any time by H. or by W. and wife on a month's notice.

Held, that the goods supplied by H. under this agreement as to stock of the business were not sold to W. and wife, and remained the property of H. until sold in the ordinary course; such goods, therefore, were not liable to seizure under execution against H. at the suit of a creditor.

Ames-Holden Co. et al. v. *Hatfield*, 24th October, 1898 .. .. xxix.

45.—Specific Performance — Title to Land—Objections to Title—Waiver.

To entitle a party to a contract to a decree for specific performance, he must have been prompt himself in performance of the obligations devolving upon him, and always ready to carry out the contract within a reasonable time, even although time might not have been of the essence of the agreement.

Specific performance will not be decreed when the party asking performance has declared his inability to carry out the agreement on his part.

A purchaser of land who takes possession of the property and exercises acts of ownership by making repairs and improvements, will be held to have waived any objections to the title.

Objections to title cannot be raised where the purchaser has made a tender of a blank deed of mortgage for execution, for the purpose of carrying out the purchase.

Wallace et al. v. *Hesselin et al.*, 21st November, 1898 .. .. xxix.

46.—Contract Binding on the Crown—Public Work—Formation of Contract—Ratification—Breach.

On Nov. 22nd, 1879, the Government of Canada entered into a contract with C., by which the latter undertook to do all the Government binding for five years from said date. The contract was executed under the authority of 32 & 33 Vic. c. 7, s. 6, and on Nov. 25th, 1879, was assigned to W., who performed all the work sent to him up to Dec. 5th, 1884, when, the term fixed by the contract having expired, he received a letter from the Queen's Printer, as follows: "I am directed by the Honourable, the Secretary of State, to inform you that, pending future arrangements, the binding work of the Government will be sent to you for execution, under the same rates and conditions as under the contract which has just expired." W. performed the work for two years under authority of this letter, and then brought an action for the profits he would have had on work given to other parties during the seven years.

Held, that the letter of the Queen's Printer did not constitute a contract binding on the Crown; that the statute authorizing such contract was not directory, but limited the power of the Queen's Printer to make a contract, except subject to its conditions; that the contractor was chargeable with notice of all statutory limitations upon the power of the Queen's Printer; and that he could not recover in respect of the work done after the original contract had expired.

On Oct. 30th, 1886, an Order in Council was passed which recited the execution and assignment of the original contract, the execution of the work by W. after it expired, and the recommendation of the Secretary of State that a formal contract should be entered into extending the original contract to Dec. 1st, 1887, and then authorized the Secretary of State to enter into such formal contract with W., but subject to the condition that the Government should waive all claims for damages by reason of non-execution or imperfect execution of the work, and that W. should waive all claims to damages because of the execution of binding work by

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other parties, up to the date of said extension. W. refused to accept the extension on such terms.

Held, that W. could not rely on the Order in Council as a ratification of the contract formed by the letter of the Queen's Printer; that the element of *consensus* enters as much into a ratification of a contract as into the contract itself; and W. could not allege a ratification after expressly repudiating its terms and refusing to be bound by it.

After an appeal from the final judgment of the Exchequer Court was lodged in the Supreme Court, the Crown obtained leave to appeal from an order of reference to ascertain the amount of the suppliant's damages.

Held, that the judge of the Exchequer Court had authority to allow the appeal, and it was properly before the Supreme Court.

The Queen v. *Woodburn*, 21st November, 1898 .. .. xxix.

47. — Married Woman — Separate Estate—C. S. U. C. c. 73—35 Vic. c. 16 (O.)—R. S. O. (1877) cc. 125 and 127—47 Vic. c. 19 (O.).

See Debtor and Creditor, 1.

48.—Building Railway—Surety for Performance of — Interference with Rights of Surety.

See Surety, 1.

49. — Novation — Promissory Note — Discharge of Maker—Reservation of Rights Against Indorser.

See Surety, 2.

50.—Purchase of Railway Ticket—Implied Contract to Produce and Deliver to Conductor.

See Railway Company, 3.

51.—Promoter of Company—Sale of Property by—Fiduciary Relationship—Non-independent Directors — Rescission.

See Company, 2.

52. — Construction of Agreement — Guarantee.

See Guarantee, 1.

53.—Sale by Auction—Agreement as to Title—Breach—Rescission.

See Vendor and Purchaser, 4.

54. — Railway Company — Carriage of Goods—Limitation of Liability—Railway Act, 1888, s. 246 (3).

See Railway Company, 8.

55.—Partnership — Winding-up — Extra Services of One Partner—Remuneration for.

See Partnership, 2.

56.—Proprietor of Newspaper—Engagement of Editor—Dismissal—Breach of Agreement.

See Master and Servant, 2.

57.—Debtor and Creditor—License to Take Possession—Bona Fide Opinion as to Debtor's Incapacity—Replevin—Conversion.

See Debtor and Creditor, 6.

58.—Vendor and Purchaser—Sale of Lands—Waiver of Objections—Lapse of Time—Will, Construction of—Executory Devise Over—Defeasible Title—Rescission of Contract.

See Will, 7.

59.—Contract—Public Work—Final Certificate of Engineer—Previous Decision—Necessity to Follow.

See Res Judicata, 6.

60.—Municipal By-law—Special Assessments—Drainage—Powers of Councils as to Debtor's Incapacity—Replevin—Ultra Vires Resolutions—Executed Contract.

See Municipal Corporation, 24.

61.—Marine Insurance—Voyage Policy—"At and from" a Port—Construction of Policy—Usage.

See Insurance Marine, 3.

62.—Railway Company—Railway Ticket—Right to Stop Over.

See Railway Company, 13.

63.—Contract of Insurance—Construction — Marine Insurance — Goods Shipped and Insured in Bulk—Loss of Portion—Total or Partial Loss.

See Insurance Marine, 4.

64.—Vendor and Purchaser—Agreement for Sale of Lands—Deviation from Terms — Giving Time — Secret Dealings—Arrears of Interest—Release of Lands — Discharge of Surety—Novation.

See Principal and Surety, 3.

65.—Joint Stock Company—Ultra Vires Contract — Consent Judgment on — Action to set Aside.

See Judgment, 4.

66.—Chartered Ship—Perishable Goods—Ship Disabled by Excepted Perils—Transshipment—Repairs—Reasonable Time—Carrier—Bailee.

See Ships and Shipping, 1.

67.—Principal and Surety—Guarantee Bond—Default of Principal—Non-disclosure by Creditor.

See Guarantee, 3.

68. — Railway Company — Carriage of Goods — Connecting Lines — Special Contract—Loss by Fire in Warehouse —Negligence—Pleading.

See Railway Company, 15.

69.—Vendor and Purchaser—Unpaid Vendor — Conditional Sale — Suspensive Condition — Moveables Incorporated with Freehold—Immoveables by Destination — Hypothecary Charges — Arts. 375 *et seq.* C. C.

See Sale, 8.

70.—Contract—Against Liability for Fault of Servants—Charter Party—Bill of Lading—Conditions of Carriage — Stowage — Fragile Goods — Negligence—Affreightment.

See Carriers, 4.

71.—Contract—Binding on Crown—Verbal Orders by Officials of the Crown—Goods sold and Delivered.

See Public Works, 3.

72.—Vendor and Purchaser—Principal and Agent — Mistake — Contract — Agreement for Sale of Land—Agent Exceeding Authority—Specific Performance—Findings of Fact.

See Vendor and Purchaser, 10.

73.—Married Woman—Separate Property —Conveyance—Contracts—C. S. N. B. c. 72.

See Married Woman, 4.

CONTRIBUTORY.

Joint Stock Company — Winding-up — Shares paid for by Transfer of Property—Adequacy of Consideration—Promoter Selling Property to Company — Trust — Fiduciary Relation — Secret Profit.

See Winding-up Act, 1.

CONTROVERTED ELECTIONS.

1.—Petition—Separate Trial — Jurisdiction—R. S. C. c. 9, ss. 30 and 50.

See Election Law, 2.

2.—Election Petition — Service — Copy—Status of Petitioner—Preliminary Objection.

See Election Law, 3.

3.—Appeal—Election Petition—Preliminary Objections—Delay in Filing—Objections Struck Out — Order in Chambers—R. S. C. c. 8, s. 50.

See Election Law, 4.

4.—Appeal—Preliminary Objections — R. S. C. c. 9, ss. 12 and 50—Order Dismissing Petition—Affidavit of Petitioner.

See Election Law, 5.

5. — Election Petition — Preliminary Objections—Affidavit of Petitioner —Bona Fides—Examination of Deponent—Form of Petition—R. S. C. c. 9—54 & 55 Vic. c. 20, s. 3.

See Election Law, 6.

6. — Election Petition — Preliminary Objections — Service of Petition — Bailiff's Return—Cross-examination —Production of Copy.

See Election Law, 7.

7. — Controverted Election — Corrupt Treating — Agent of Candidate — Limited Agency—Trivial or Unimportant Corrupt Act—54 & 55 Vic. c. 20, s. 19—Benefit of.

See Election Law, 8.

CONVENTION.

See Treaty.

CONVEYANCE.

1.—Contract for Sale of Land — Payment of Purchase Money on Delivery of Conveyance—Duty to Prepare.

A provision in a contract for purchase of land that the purchase money is to be paid as soon as the conveyance is ready for delivery does not alter the rule that the conveyance should be prepared by the purchaser. Fournier and Taschereau, JJ., dissenting.

Stevenson v. *Davis* .. .. .. xxiii., 629

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2.—Contract for Sale of Land—Tender of Conveyance—Objection to—Delay—Default of Vendor—Payment of Interest.

See Vendor and Purchaser, 2.

3.—Conveyancing—Mortgage—Leasehold Premises—Terms of Mortgage—Assignment or Sub-lease.

See Mortgage, 9.

And *see* Deed, Lease, Mortgage.

COSTS.

1.—Appeal for—Mistake.

Though an appeal will not lie in respect of costs only, yet where there has been a mistake upon some matter of law, or of principle, which the party appealing has an actual interest in having reviewed, and which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal.

Archibald v. *deLisle.*

Baker v. *deLisle.*

Mowat v. *deLisle* .. .. xxv., 1

2.—Appeal—Jurisdiction—Amount in Controversy—Affidavits—Conflicting as to Amount—The Exchequer Court Acts—50 & 51 Vic. c. 16, ss. 51-53 (D.)—54 & 55 Vic. c. 26, s. 8 (D.)—The Patent Act—R. S. C. c. 61, s. 36.

On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants, showing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion.

Dreschel et al. v. *Auer Incandescent Light Mfg. Co.* .. .. xxviii., 268

3.—Libel—Slander—Privileged Statements—Public Interest—Charging Corruption Against Political Candidate—Challenging to Sue—Justification—Costs.

The defendant had caused a defamatory statement to be printed in a newspaper, and on a separate fly-sheet, and circulated through the constituency, during a Parliamentary election, with a printed challenge to the plaintiff and others implicated in the charges made to justify their innocence by taking an action for damages in case they were not guilty, and offering at the same time to make a deposit to cover the costs of suit.

The Supreme Court of Canada, in affirming the judgment of the Court of Queen's Bench for Lower Canada (which had reversed the judgment of the Superior Court in favour of the plaintiff, and dismissed the action without costs), refused to allow costs under the circumstances. Strong, C.J., dissented, being of opinion that the Superior Court judgment for $100 damages with costs as of an action for that amount should be restored.

Gauthier v. *Jeannotte,* 14th June, 1898, xxviii., 590

4.—Appeal—Discretion of Court Appealed from—Costs.

It is only when some fundamental principle of justice has been ignored, or some other gross error appears that the Supreme Court will interfere with the discretion of provincial courts in awarding or withholding costs.

Smith v. *The Saint John City Railway Company.*

The Consolidated Electric Company v. *The Atlantic Trust Company.*

The Consolidated Electric Company v. *Pratt.* xxviii., 603

5.—Reimbursement of Costs Paid Under Supreme Court Order—Reversal of Judgment by Privy Council.

See Practice, 26.

6.—Solicitor and Client—Fund in Court—Lien—Priority of Payment.

See Solicitor.

7.—Appeal—Incomplete Record—Case Remitted to Trial Court—Directions as to Costs.

See Practice, 31.

8.—Appeal—Jurisdiction—Award by Drainage Referee—R. S. C. c. 135, s. 24.

See Appeal, 32.

9.—Appeal—Dismissal for want of Prosecution—Application to Reinstate—Notice—Practice.

See Practice, 38.

10. — Appeal — Cross-appeal to Privy Council—Practice—Stay of Proceedings—Costs Ordered to be Costs in the Cause.

See Practice, 40.

COUNTY COURT JUDGE.

Appeal—Jurisdiction—52 Vic. c. 37, s. 2 (D.)—Appointment of Presiding Officers—County Court Judges—55 Vic. c. 48 (Ont.)—57 Vic. c. 51, s. 5 (Ont.)—58 Vic. c. 47 (Ont.) — Construction of Statute—Appeal from Assessment—Final Judgment—"Court of Last Resort."

See Appeal, 64.

COUNTY COURT JUDGMENT.

Sheriff—Trespass—Sale of Goods by Insolvent—Bona Fides—Judgment of Inferior Tribunal — Estoppel — Res Judicata — Bar to Action — Fraudulent Preferences—Pleading.

See Insolvency, 1.

COURT.

1.—Jurisdiction—Action for Redemption—Foreign Lands — Lex rei sitae—Action in Personam.

An Ontario Court will not grant a decree for redemption of a mortgage on lands in Ontario at suit of a judgment creditor of a mortgagor, whose judgment being registered is, by statute in Manitoba, a charge upon the lands, the judgment creditor and mortgagee both having domicile in Ontario.

The only *locus standi* the judgment creditor would have in an Ontario Court would be to have direct relief against the land by means of a sale to which relief he would be restricted in such a case in a suit in the courts of Manitoba, and a decree for a sale would have been unenforceable in the latter province.

A court of equity will, where personal equities exist between two parties over whom it has jurisdiction, though such equities may refer to foreign lands, give relief by a decree operating not directly upon the lands, but directly *in personam*, but such relief will never be extended so far as decreeing a sale in the nature of an equitable execution.

Henderson v. *Bank of Hamilton* .. xxiii., 710

2.—Appeal—Jurisdiction—52 Vic. c. 37, s. 2 (D.) — Appointment of Presiding Officers—County Court Judges—55 Vic. c. 48 (Ont.)—57 Vic. c. 51, s. 5 (Ont.)—58 Vic. c. 47 (Ont.)—Construction of Statute—Appeal from Assessment — Final Judgment—"Court of Last Resort."

See Appeal, 64.

COURT HOUSES AND GAOLS.

Municipal Corporation—Construction of Statute — 55 Vic. c. 42, ss. 397, 404, 469, 473 (Ont.)—City Separated from County—Maintenance of Court House and Goal—Care and Maintenance of Prisoners.

See Arbitration, 4.

COURT OF PROBATE.

Jurisdiction—Accounts of Executors and Trustees—Res Judicata.

See Trusts.

COVENANT.

1. — Lease for one Year — Dominion License to cut Timber—Warranty of Title—Quiet Enjoyment.

See Crown Lands, 1.

2.—Mortgage—Married Woman—Implied Contract—Disclaimer.

See Married Woman, 3.

CRIMINAL LAW.

1.—Criminal Proceeding — Contempt of Court.

Contempt of Court is a criminal proceeding.

Ellis v. *The Queen* .. .. xxii., 7

And *see* Appeal, 4.

" Contempt of Court.

2.—Criminal Appeal — Criminal Code, 1892, s. 742—Undivided Property of Co-heirs—Fraudulent Appropriations—Unlawfully Receiving—R. S. C. c. 164, ss. 65, 83, 85.

Where on a criminal trial a motion for a reserved case made on two grounds is refused, and on appeal to the Court of Queen's Bench (appeal side), that Court is unanimous in affirming the decision of the trial Judge as to one of such grounds, but not as to the other, an appeal to the Supreme

Court can only be based on the one as to which there was dissent.

A conviction under sec. 85 of the Larceny Act, R. S. C. c. 164, for unlawfully obtaining property, is good, though the prisoner, according to the evidence, might have been convicted of a criminal breach of trust under s. 65.

A fraudulent appropriation by the principal, and a fraudulent receiving by the accessory, may take place at the same time and by the same Act.

Two bills of indictment were presented against A. and B. under ss. 83 and 85 of the Larceny Act. By the first count each was charged with having unlawfully and with intent to defraud taken and appropriated to his own use $7,000 belonging to the heirs of C., so as to deprive them of their beneficiary interest in the same. The second count charged B. (the appellant) with having unlawfully received the $7,000, the property of the heirs which had before then been unlawfully obtained and taken and appropriated by said A., the taking and receiving being a misdemeanour under s. 85, c. 164 R. S. C. at the time when he so received the money. A. who was the executor of C.'s estate, and the custodian of the money, pleaded guilty to the charge on the first count. B. pleaded not guilty, was acquitted of the charge on the first count, but was found guilty of unlawfully receiving. On the question submitted, in a reserved case, whether B. could be found guilty of unlawfully receiving money from A., who was custodian of the money as executor, the Court of Queen's Bench for Lower Canada (on appeal), Sir A. Lacoste, C.J., dissenting, held the conviction good. At the trial it was proved that A. and B. agreed to appropriate the money, and that when A. drew the money he purchased his railway ticket for the United States, made a parcel of the money, took it to B.'s store, and handed it to him saying: "Here is the boodle; take good care of it." On the same evening, he absconded to New York.

On appeal to the Supreme Court of Canada:

Held, affirming the judgment of the court below, that whether A. be a bailee or trustee, and whether the unlawful appropriation by A. took place by the handing over of the money to B. or previously, B. was properly convicted under s. 85, c. 164 R. S. C., of receiving it knowing it to have been unlawfully obtained. Gwynne, J., dissenting.

McIntosh v. *The Queen* .. .. .. xxiii., 180

3.—Betting on Election—Stakeholder—R. S. C. c. 159, s. 9—Accessories—R. S. C. c. 145, s. 7.

The depositary of money staked by two individuals on the result of an election for the House of Commons is guilty of a misdemeanour under R. S. C. c. 159, s. 9 (Crim. Code, s. 204), and the bettors are accessories to the Commission of the offence. *Reg.* v. *Dillon* (10 Ont. P. R. 352), overruled.

Walsh v. *Trebilcock* .. .. .. xxiii., 695

4.—Will—Devise—Death of Testator Caused by Devisee—Felonious Act.

No devisee can take under the will of a testator, whose death has been caused by the criminal and felonious act of the devisee himself, and in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter. Taschereau, J., dissenting.

Lundy v. *Lundy* .. .. xxiv., 650

5.—The Criminal Code, s. 575—Persona Designata—Officers de Facto and de Jure — Chief Constable — Common Gaming House—Confiscation of Gaming Instruments, Moneys, Etc. — Evidence—The Canada Evidence Act, 1893, ss. 2, 3, 20 and 21.

Section 575 of the Criminal Code, authorizing the issue of a warrant to seize gaming implements on the report of "the chief constable or deputy chief constable" of a city or town, does not mean that the report must come from an officer having the exact title mentioned, but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the City of Montreal. Girouard, J., dissenting.

The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable though he was not such *de jure*.

In an action to revendicate the moneys so seized, the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke "The Canada Evidence Act, 1893," so as to be a competent witness in his own behalf in the province of Quebec.

Per Strong, C.J. A judgment declaring the forfeiture of money so seized cannot be collaterally impeached in an action of revendication.

O'Neill v. *The Attorney-General of Canada*, xxvi., 122

6.—Construction of Statute—20 & 21 Vic. c. 54, s. 12 (Imp.)—Application—Criminal Prosecution — Embezzlement of Trust Funds — Suspension of Civil Remedy — Stifling Prosecution — Partnership.

The Imperial Act, 20 & 21 Vic. c. 54, s. 12, provides that "Nothing in this Act contained, nor any proceeding conviction or judgment to be had or taken thereon against any person under this Act, shall prevent, lessen or impeach any remedy at law or in equity, which any party agreived by any offence against this Act might have had if this Act had not passed; * * * and nothing in this Act contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or re-payment of any trust property misappropriated."

Held, affirming the judgment of the Supreme Court of British Columbia (5 B. C. Rep. 571), that the class of trustees referred to in said Act were those guilty of misappropriation of property held upon express trusts.

Semble, that the section only covered agreements or securities given by the defaulting trustee himself.

Quære.—Is the said Imperial Act in force in British Columbia?

If in force it would not apply to a prosecution for an offence under R. S. C. c. 264 (Larceny Act), s. 58.

Action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. c. 264, s. 58 [not re-enacted in Crim. Code, 1892].

Held, that the alleged criminal act, having been committed before the Code came into force, was not affected by its provisions and the covenant was illegal at common law. Further, the partnership property not having been held on an express trust, the civil remedy was not preserved by the Imperial Act.

Major v. *McCraney*, 21st Nov., 1898, xxix.

7.—Debtor and Creditor — Pretended Agent of Creditor—False Representations—Fraud—Ratification— Indictable Offence.

See Debtor and Creditor, 3.

8.—Criminal Code, ss. 275, 276—Canadian Subject Marrying Abroad—Jurisdiction of Parliament.

See Bigamy.

CROWN.

1.—Crown Lands—Dominion License to Cut Timber — Implied Covenant — Warranty of Title—Quiet Enjoyment.

Licenses granted and actually current in 1884 and 1885 conferred upon the licensee "full right, power and license to take and keep exclusive possession of the said lands except as thereinafter mentioned for and during the period of one year from the 31st December, 1883, to 31st December, 1884, and no longer."

Quære. Though this was in law a lease for one year of the lands comprised in the license, was the Crown bound by any implied covenant to be read into the license for good right and title to make the lease and for quiet enjoyment?

Bulmer v. *The Queen* .. .. .. xxiii., 488

2.—Constitutional Law — Navigable Waters—Title to Soil in Bed of—Dedication of Public Lands—Presumption of Dedication — User — Obstruction to Navigation — Public Nuisance—Balance of Convenience.

The user of a bridge over a navigable river for 35 years is sufficient to raise a presumption of dedication.

If a province before Confederation had so dedicated the bed of a navigable river for the purposes of a bridge, that it could not have objected to it as an obstruction to navigation, the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.

An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance though of very great public benefit, and the obstruction of the slightest possible degree.

The Queen v. *Moss* .. .. xxvi., 322

3.—Municipal Corporation — Highways — Old Trails in Rupert's Land—Substituted Roadways—Necessary Way—R. S. C. c. 50, s. 108—Reservation in Crown Grant — Dedication — User — Estoppel — Assessment of Lands Claimed as Highway—Evidence.

The user of old travelled roads or trails over the waste lands of the Crown in the North-West Territories of Canada, prior to the Dominion Government Survey thereof does not give rise to a presumption that

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the lands over which they passed were dedicated as public highways.

The land over which an old travelled trail had formerly passed, leading to the Hudson Bay Trading Post at Edmonton, N. W. T., had been enclosed by the owner, divided into town lots and assessed and taxed as private property by the municipality, and a new street substituted therefor shewn upon registered plans of sub-division, and laid out upon the ground had been adopted as a boundary in the descriptions of lands abutting thereon in the grants thereof by Letters Patent from the Crown.

Held, reversing the decision of the Supreme Court of the North-West Territories, that under the circumstances, there could be no presumption of dedication of the lands over which the old trail passed as a public highway, either by the Crown or by the private owner, notwithstanding long user of the same by settlers in that district prior to the Dominion Government Survey of the Edmonton Settlement.

Heiminck v. *Town of Edmonton* .. xxviii., 501

4.—Crown Grant—Disseisin of Grantee—Tortious Possession — Statute of Maintenance, 32 Hen. 8, c. 9.

See Title to Land, 3.

5.—Title to Land—Railway Belt in British Columbia—Unsurveyed Lands—Pre-emption—Federal and Provincial Rights—47 Vic. c. 6 (D.).

See Constitutional Law, 1.

6.—Territorial and Prerogative Rights—Exercise of—Beneficial Interest—Actions by Dominion Government—Exchequer Court—Information of Intrusion — Subsequent Action — Practice.

See Constitutional Law, 2.

7.—Foreshore of Harbour—Title to—Grant to Railway of User—Interference with Access to—Jus Publicum.

See Constitutional Law, 4.

8. — Petition of Right — Contract for Public Work—Extras—Final Certificate.

See Contract, 5.

9.—Construction of Public Work—Interference with Public Rights—Injury to Private Owner.

See Public Work, 1.

10.—Public Work—Terms of Contract—Authority of Government Engineer to Vary—Delay.

See Contract, 10.

11.—Government Buildings — Supply of Water to—Water Rates—Discount for Prompt Payment—Refusal of Discount.

See Municipal Corporation, 11.

12.—Grant of Land—Title—Possession.

See Title to Land, 7.

13.—Public Work—Obstruction to Canal—Use of Canal.

See Expropriation, 2.

14.—Crown Lands—Patent for—Reservation of Minerals.

See Crown Lands, 2.

15.—Railway Subsidy — Application—Discretion—Trust—Petition of Right.

See Constitutional Law, 6.

16.—Liability for Tort—Injury to Property on Public Work—50 & 51 Vic. c. 16 (D.).

See Constitutional Law, 9.

17.—Government of Quebec — Retired Official—Commutation of Pension—Interest of Wife—Transfer.

See Pension de Retraite.

18.—Negligence — Servants of Crown — Common Employment—Law of Quebec—50 & 51 Vic. c. 16.

See Negligence, 11.

19. — Constitutional Law — Powers of Executive Councillors—"Letter of Credit"—Obligations Binding on Provincial Legislatures — Government Expenditures— Negotiable Instrument—"Bills of Exchange Act, 1890" "The Bank Act," R. S. C. c. 120.

See Constitutional Law, 11.

20.—Contracts Binding on the Crown—Goods Sold and Delivered on Verbal Orders by Crown Officials—Supplies in Excess of Tender—Errors and Omissions in Accounts — Interest against the Crown.

See Interest, 1.
" Public Works, 3.
" Statute, 40.

21.—Highway—Old Trails in Rupert's Land—Substitution of New Way—Dedication.

See Dedication, 1.

22.—Contract Binding on the Crown—Public Work—Formation of Contract—Order in Council—Ratification—Breach.

See Contract, 46.

CROWN LANDS.

1.—Disputed Territory—License to Cut Timber—Implied Warranty of Title—Breach of Contract—Damages.

The claimant applied to the Government of Canada for licenses to cut timber on ten timber berths situated in the territory lately in dispute between that Government and the Government of Ontario. The application was granted on the condition that the applicant would pay certain ground-rents and bonuses, make surveys and build a mill. The claimant knew of the dispute which was at the time open and public. He paid the rents and bonuses, made the surveys and enlarged a mill he had previously built, which was accepted as equivalent to building a new one. The dispute was determined adversely to the Government of Canada, at the time six leases or licenses were current, and consequently the Government could not renew them. The lease was granted under sections 49 and 50 of 46 Vic. c. 17, and the regulations made under the Act of 1879 provided that "the license may be renewed for another year subject to such revision of the annual rental and royalty to be paid therefor as may be fixed by the Governor in Council."

In a claim for damages by the licensee;—

Held, 1. Orders in Council issued pursuant to 46 Vic. c. 17, ss. 49 and 50, authorizing the Minister of the Interior to grant licenses to cut timber, did not constitute contracts between the Crown and proposed licenses to cut timber, did not constitute convocable by the Crown until acted upon by the granting of licenses under them.

2. The right of renewal of the licenses was optional with the Crown, and the claimant was entitled to recover from the Government only the moneys paid to them for ground rents and bonuses.

The licenses which were granted and actually current in 1884 and 1885 conferred upon the licensee "full right, power and license to take and keep exclusive possession of the said lands, except as thereinafter mentioned for and during the period of one year from the 31st of December, 1883, to the 31st December, 1884, and no longer."

Quære. Though this was in law a lease for one year of the lands comprised in the license was the Crown bound by any implied covenant to be read into the license for good right and title to make the lease, and for quiet enjoyment?

Bulmer v. *The Queen* .. .. .. xxiii., 488

2.—Patent—Reservation of Coal—Order in Council—Agreement.

Certain Crown lands in Quebec had been granted to the suppliants, as assignees of one Kaye, the applicant for said lands, from which the Crown contended the coal thereon was reserved, which was the sole question in issue. The Exchequer Court (3 Ex. C. R. 157), held that there being no express or implied agreement to the contrary the suppliants were entitled to a grant conveying such mines and minerals as would pass without express words.

The Supreme Court of Canada affirmed the judgment of the Exchequer Court, and dismissed the Appeal with costs.

The Queen v. *The Canadian Agricultural, Coal and Colonization Co.*, 6th May, 1895, xxiv., 713

3.—Action en Bornage—R. S. Q. Arts. 4153, 4154, 4155.

See Boundary, 1.

4.—Dedication—User—Presumption of Dedication—Public Nuisance.

See Constitutional Law, 15 and 17.

CROWN LAW OFFICE.

Construction of Contract — Public Works—Arbitration — Progress Estimates — Engineer's Certificate — Appeal by Head of Department—Final Estimates — Condition Precedent.

See Contract, 37.

CUSTOMS DUTIES.

1.—50 & 51 Vic. c. 39, Items 88 and 173—Exemption From Duty—Steel Rails for Use on Railways—Application to Street Railways.

The exemption from duty in 50 & 51 Vic. c. 39, item 173, of "steel rails weighing not less than twenty-five pounds per lineal yard, for use on railway tracks," does not apply to rails to be used for street railways, which

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are subject to duty as "rails for railways and tramways of any form," under item 88. Strong, C.J., and King, J., dissenting.

Toronto Railway Co. v. *The Queen*, XXV., 24 MEMO. See (1896) A.C. 551.

2. — REVENUE — IMPORTED GOODS — TARIFF ACT — RETROSPECTIVE LEGISLATION — R. S. C. c. 32—57 & 58 VIC. c. 33 (D.)—58 & 59 VIC. c. 23 (D.).

See Legislation.

CUSTOM OF TRADE.

1.—SHIPMENT OF GRAIN—TRANSSHIPMENT IN TRANSIT — CONTINUING ORIGINAL BILLS OF LADING.

See Bill of Lading, 2.

2.—VOYAGE POLICY — "AT AND FROM" A PORT—CONSTRUCTION OF POLICY—USAGE.

See Insurance, Marine, 3.

DAMAGES.

1.—ACTION FOR NEGLIGENCE — EXCESSIVE DAMAGES—NEW TRIAL.

See Negligence, 3.

2.—CONTRACT FOR BUILDING ENGINE—CONSTRUCTION OF—TIME FOR COMPLETION—DELAY.

See Contract, 20.

3. — REMOTE CAUSE — STREET RAILWAY — EJECTMENT FROM CAR — CONSEQUENT ILLNESS.

See Negligence, 12.

4. — LIABILITY FOR LOSS — MEASURE OF DAMAGES.

See Principal and Agent, 1.

5.—APPEAL—CROSS-APPEAL—R. S. O. (1887) c. 44, ss. 47, 48—SUPREME COURT, RULE 61.

See Appeal, 39.

6.—PUBLIC WORK—WHARF PROPERTY INJURIOUSLY AFFECTED—EVIDENCE.

See Public Work, 2.

7.—NUISANCE—LIVERY STABLE — OFFENSIVE ODOURS—NOISE OF HORSES.

See Nuisance, 1.

8.—ACTION OF WARRANTY—NEGLIGENCE—OBSTRUCTION OF STREET—ASSESSMENT OF DAMAGES—QUESTIONS OF FACT.

See Appeal, 44.

9.—CONSTITUTIONAL LAW—MUNICIPAL CORPORATION—POWERS OF LEGISLATURE—LICENSE — MONOPOLY — HIGHWAYS AND FERRIES—TOLLS—NAVIGABLE STREAMS—BY-LAWS AND RESOLUTIONS — INTERMUNICIPAL FERRY — DISTURBANCE OF LICENSEE — CLUB ASSOCIATIONS, COMPANIES AND PARTNERSHIPS—NORTH-WEST TERRITORIES ACT, R. S. C. c. 50, ss. 13 AND 24—B. N. A. ACT (1867), s. 92, ss- 8, 10 AND 16—REV. ORD. N. W. T. (1888), c. 28—N. W. TER. ORD. No. 7 OF 1891-92, s. 4.

See Constitutional Law, 14.

DATION EN PAIEMENT.

SALE—DONATION IN FORM OF—GIFTS IN CONTEMPLATION OF DEATH — MORTAL ILLNESS OF DONOR—PRESUMPTION OF NULLITY — VALIDATING CIRCUMSTANCES ARTS. 762, 989 C. C.

During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale, for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee, and the consideration acknowledged by the deed was never paid.

Held, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of article 762 of the Civil Code, as the circumstances tended to show that the transaction was actually for good consideration (*dation en paiement*), and consequently legal and valid.

Valade v. *Lalonde* .. .. .. XXVII., 551

DEBTOR AND CREDITOR.

1. — MARRIED WOMAN'S PROPERTY — SEPARATE ESTATE—CONTRACT BY MARRIED WOMAN — SEPARATE PROPERTY EXIGIBLE—C. S. U. C. c. 73—35 VIC. c. 16 (O.)—R. S. O. (1877) cc. 125 AND 127—47 VIC. c. 19 (O.).

A woman married between 1859 and 1872 acquired, in 1879 and 1882, lands in Ontario as her separate property, and in 1887, before the Married Woman's Property Act of that year (R. S. O. c. 132), came into force, she became liable on certain promissory notes made by her.

Held, reversing the decision of the Court of Appeal, that the liability of her separate property to satisfy a judgment on said promissory notes depended on the construction of the Married Woman's Real Estate Acts

of 1887 (R. S. O. cc. 125, 127), and the Married Woman's Property Act, 1884 (47 Vic. c. 19), read in the light furnished by certain clauses of C. S. U. C. c. 73; and that her capacity to sue and be sued in respect thereof carried with it a corresponding right on the part of her creditors to obtain the fruits of a judgment against her by execution on such separate property.

Moore v. *Jackson* .. .. xxii., 210

2.—Goods Sold—Person to Whom Credit was Given — Assignment in Trust — Power of Attorney by Trustee—Authority of Attorney to Use Principal's Name—Evidence.

A., doing business under the name of J. A. & Sons, assigned all his property and effects to H. for benefit of creditors. H., by power of attorney, authorized A. to collect all moneys due his estate, etc., and to carry on the business if expedient. A. continued the business as before, and in the course of it purchased goods from F., to whom on some occasions he gave notes signed "J. A. & Sons, H. trustee per A." All the goods so purchased from F. were charged in his books to J. A. & Sons, and the dealings between them after the assignment continued for five years. Finally, A. being unable to pay what was due to F., the latter brought an action against H. on notes signed as above, and for the price of goods so sold to A.

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that the evidence at the trial of the action clearly showed that the credit for the goods sold was given to A. and not to H.; that A. did not carry on the business after the assignment at the instance or as the agent of H., nor for the benefit of his estate; that A. was not authorized to sign H.'s name to notes as he did; and that H. was not liable either as the person to whom credit was given or as an undisclosed principal.

Held, further, that if H. was guilty of a breach of trust in allowing A. full control over the estate, that would not make him liable to F. in this action.

Hechler v. *Forsyth* .. .. .. xxii., 489

3.—Payment to Pretended Agent—False Representations as to Authority—Ratification by Creditor—Indictable Offence.

Where payment is obtained from a debtor by one who falsely represents that he is agent of the creditor, upon whom a fraud is thereby committed, if the creditor ratifies and confirms the payment he adopts the agency of the person receiving the money and makes the payment equivalent to one to an authorized agent.

The payment may be ratified and the agency adopted, even though the person receiving the money has, by his false representations, committed an indictable offence.

Scott v. *Bank of New Brunswick*, xxiii., 277

4.—Insolvency—Knowledge of, by Creditor — Fraudulent Preference — Pledge—Warehouse Receipt — Novation—Arts. 1035, 1036, 1169 C. C.

W. E. E., connected with two business firms in Montreal, viz., the firm of W. E. Elliott & Co., oil merchants, of which he was the sole member, and Elliott, Finlayson & Co., wine merchants, made a judicial abandonment on the 18th August, 1889, of his oil business. Both firms had kept their accounts with the Bank of Commerce. The bank discounted for W. E. Elliott & Co., before his departure for England on the 30th June, a note of $5,087.50 due 1st October, signed by John Elliott & Co., and indorsed by W. E. Elliott & Co. and Elliott, Finlayson & Co., and on the 5th July took, as collateral security from Finlayson, who was also W. E. Elliott's agent during his absence, a warehouse receipt for 292 barrels of oil, and the discount was credited to Elliott, Finlayson & Co. On and about the 9th July 146 barrels were sold, and the proceeds, viz., $3,528.30, were subsequently, on the 9th August, credited to the note of $5,087.50. On the 13th July, McDougall, Logie & Co. failed, and W. E. E. was involved in the failure to the extent of $17,000, of which amount the bank held $7,559.30, and on the 16th July, Finlayson, as agent for W. E. E., left with the bank as collateral security against W. E. E.'s indebtedness of $7,559.30 on the paper of McDougall, Logie & Co., customers' notes to the amount of $2,768.28, upon which the bank collected $1,603.43, and still kept a note of J. P. & Co. unpaid of $1,165.32. On the return of W. E. E., another note of John Elliott & Co., for $1,101.33, previously discounted by W. E. E., became due at the bank, thus leaving a total debit of the Elliott firms, on their joint paper, of $2,660.53. The old note of $5,087.50 due 1st October, and the one of $1,101.33 were signed by John Elliott & Co., and on the 10th August were replaced by two notes signed by Elliott, Finlayson & Co., and secured by 200 barrels of old, 146 barrels remaining from the original number pledged, and an additional warehouse receipt of 54 barrels of oil, indorsed over by W. E. E. to

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Finlayson, Elliott & Co., and by them to the bank. The respondent, as curator for the estate of W. E. Elliott & Co., claimed that the pledge of the 200 barrels of oil on the 10th August, and the giving of the notes on the 16th July to the bank, were fraudulent preferences. The Superior Court held that the bank had knowledge of W. E. E.'s insolvent condition on or about the 13th of July, and declared that they had received fraudulent preferences by receiving W. E. E.'s customers' notes, and the 200 barrels of oil, but the Court of Appeal, reversing in part the judgment of the Superior Court, held that the pledging of the 200 barrels of oil by Elliott, Finlayson & Co. on the 10th August was not a fraudulent preference.

On an appeal and cross-appeal to the Supreme Court:

Held, 1st, That the finding of the Courts below of the fact that the bank's knowledge of W. E. Elliott's insolvency dated from the 13th July, was sustained by evidence in the case, and there had therefore been a fraudulent preference given to the bank by the insolvent in transferring over to it all his customers' paper not yet due. Gwynne, J., dissenting.

2ndly, That the additional security given to the bank on the 10th of August of 54 barrels of oil for the substituted notes of Elliott, Finlayson & Co., was also a fraudulent preference. Gwynne, J.,dissenting.

3rdly, Reversing the judgment of the Court of Queen's Bench and restoring the judgment of the Superior Court, that the legal effect of the transaction of the 10th August was to release the pledged 146 barrels of oil, and that they became immediately the property of the insolvent's creditors, and could not be held by the bank as collateral security for Elliott, Finlayson & Co.'s substituted notes. Gwynne and Patterson, JJ., dissenting.

Stevenson v. *Canadian Bank of Commerce*, xxiii., 530

5.—Loan by Savings Bank—Pledge of Securities for—Validity of—Insolvency of Borrower—Right of Curator to Impugn Transaction—R. S. C. c. 122, s. 20.

L. borrowed a sum of money from a savings bank which he agreed to repay with interest, transfesring in pledge as collateral security letters of credit on the Government of Quebec. L. having become insolvent the bank filed its claim for the amount of the loan, with interest, with the curator of the estate, and on appeal the appellants, as creditors of L., contested on the ground that the said securities were not of the class mentioned in the Act relating to savings banks (R. S. C. c. 122, s. 20), and the bank's act in making said loan was *ultra vires* and illegal.

Held, that L., having received good and valid consideration for his promise to repay the loan, could not, nor could the appellants, his creditors, who had no other rights than the debtor himself had, impugn the contract of loan, or be admitted to assail the pledge of the securities.

Assuming that the act of the bank in lending the money, on the pledge of such securities, was *ultra vires*, although this might affect the pledge as regards third parties interested in the securities, it was not, of itself and *ipso facto*, a radical nullity of public order of such a character as to disentitle the bank under arts. 989 and 990 C. C. from claiming back the money with interest. *Bank of Toronto* v. *Perkins* (8 Can. S. C. R. 903), distinguished.

Rolland v. *La Caisse d'Economie de Quebec*, xxiv., 405

6.— Agreement — Conditional License to take Possession of Goods—Creditor's Opinion of Debtor's Incapacity—Bona Fides of—Replevin—Conversion.

F., a trader, having become insolvent, and being indebted among others to the firm of T. M. & Co., composed of T. and M., arranged to pay his other creditors 50 per cent. of their claims, T. M. & Co., indorsing his notes for securing such payment, they to be paid in full, but payment to be postponed until a future named day. T. M. & Co. were secured for indorsing by an agreement under seal, by which it was agreed that if F. should at any time, in the opinion of T. M. & Co., or either of them, become incapable of attending to his business, the debt due T. M. & Co., should at once become due, and they could take possession of the stock in trade, book debts, and property of F., and sell the same for their claim, having first served on F. a notice in writing, signed by the firm name, stating that in their opinion F. was so incapable; and that on a change in the firm of T. M. & Co., the agreement should enure to the benefit of the firm as changed if it assumed the liabilities of, and took over T.'s indebtedness to the old firm. This arrangement was carried out, and some time after the date for payment to T. M. & Co., payment not having been made, a bank to which F. was indebted failed, and T. M. & Co., then consisting of T. and N., M. having retired, persuaded F. to assign his book debts to them, and afterwards served

on him a notice as required by the agreement, and took possession of his place of business and stock. F. then agreed to act for T. M. & Co., until a certain day after, and resumed possession, but when T. M. & Co. returned on said day he disputed their right, and ejected them from the premises. Two days after he assigned to the official assignee for the benefit of all his creditors, and T. M. & Co. issued a writ to replevy the goods from him and the assignee.

Held, affirming the decision of the Court of Queen's Bench, Gwynne, J., dissenting, that F. and the assignee were guilty of a joint conversion of the property replevied.

Gwynne, J., held that there was no conversion by either.

Held, also, affirming said decision, Gwynne, J., dissenting, that if T. M. & Co. formed an honest opinion that F. was incapable such opinion must govern, though mistaken in point of law or fact, illogical or inconclusive; that they were justified in believing from his loose business methods, waste of time over small matters, financial embarrassments, and acting under the direction of his creditors, that F. was worn down by worry and generally unfit for business; that the fact that the notice would not have been given if certain demands of T. M. & Co. had been complied with did not necessarily show *mala fides*; and that the change in the firm of T. M. & Co., did not vitiate the notice as one of the original members clearly formed the opinion, if one was formed, and conveyed it to F.

Francis v. *Turner* .. .. xxv., 110

7.—Principal and Surety—Giving Time to Principal — Reservation of Rights Against Surety.

Where a creditor gives his debtor an extension of time for payment, a formal agreement is not required to reserve his rights against a surety, but such reservation may be made out from what took place when the extension was given. *Wyke* v. *Rogers* (1 DeG. M. & G. 408), followed.

Gorman v. *Dixon* .. .. xxvi., 87

8.—Composition and Discharge—Acquiescence in — New Arrangement of Terms of Settlement—Waiver of Time Clause—Principal and Agent—Deed of Discharge—Notice of Withdrawal from Agreement — Fraudulent Preferences.

Upon default to carry out the terms of a deed of composition and discharge, a new arrangement was made respecting the realization of a debtor's assets and their distribution, to which all the executing creditors appeared to have assented.

Held, that a creditor who had benefited by the realization of the assets, and by his action given the body of the creditors reason to believe that he had adopted the new arrangement, could not repudiate the transaction upon the ground that the new arrangement was not fully understood, without at least a surrender of the advantage he had received through it.

The debtor's assent to such repudiation and the grant of better terms to the one creditor would be a fraud upon the other creditors, and as such inoperative and of no effect.

Howland, Sons & Co. v. *Grant* .. xxvi., 372

9.—Debtor and Creditor—Payment by Debtor—Appropriation — Preference R. S. O. (1887) c. 124.

A trader carrying on business in two establishments mortgaged both stocks in trade to B. as security for indorsements on a composition with his creditors, and for advances in cash, and goods to a fixed amount. The composition notes were made and indorsed by B., who made advances to an amount considerably over that stated in the mortgage. A few months after the mortgagor was in default for the advances and a portion of overdue notes, and there were some notes not matured, and B. consented to the sale of one of the mortgaged stocks, taking the purchaser's notes in payment, applying the amount generally in payment of his overdue debt, part of which was unsecured. A few days after B. seized the other stock of goods covered by his mortgage, and about the same time the sheriff seized them under execution, and shortly after the mortgagor assigned for benefit of creditors. An interpleader issue between B. and the execution creditor resulted in favour of B., who received out of the proceeds of the sale of the goods under an order of the Court, the balance remaining due on his mortgage. *Horsfall* v. *Boisseau* (21 Ont. App. R. 663). The assignee of the mortgagor then brought an action against B. to recover the amount representing the unsecured part of his debt, which was paid by the purchase of the first stock, which payment was alleged to be a preference to B. over the other creditors.

Held, affirming the decision of the Court of Appeal, that there was no preference to B. within R. S. O. [1887] c. 124, s. 2; that his position was the same as if his whole

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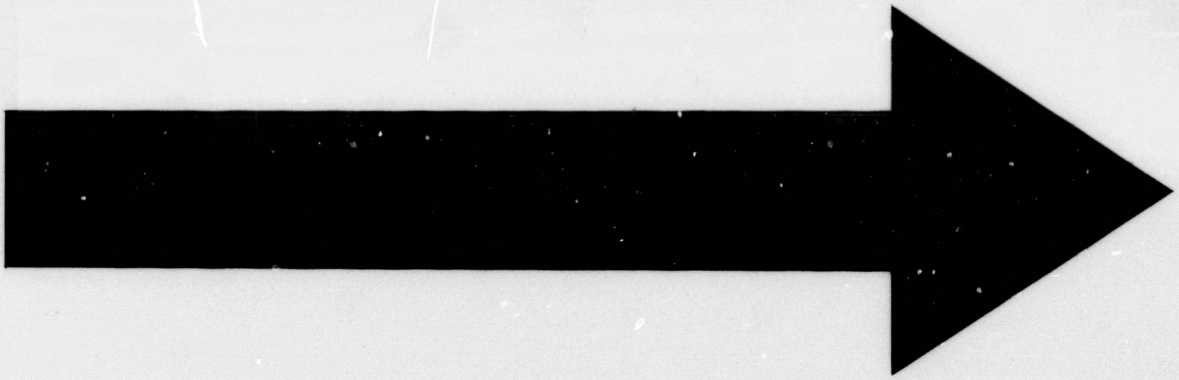

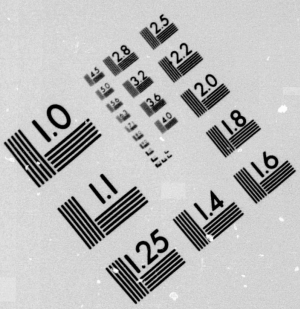

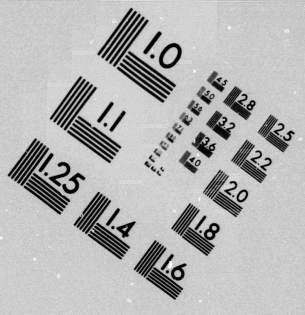

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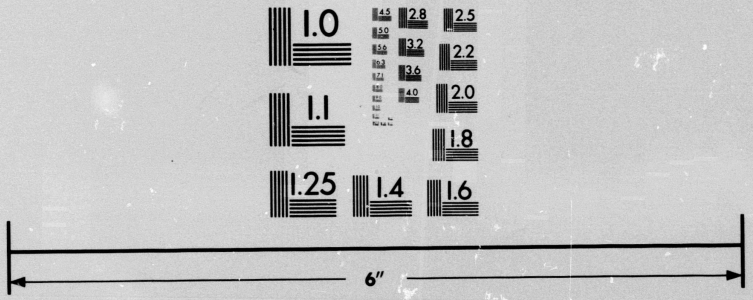

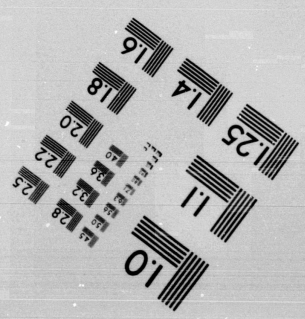

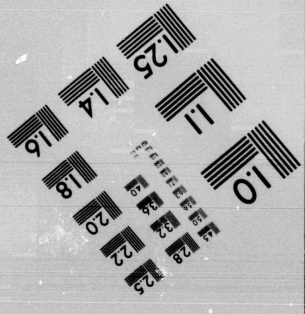

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debt secured and unsecured had been overdue, and there had been one sale of both stocks of goods, realizing an amount equal to such debt, in which case he could have appropriated a portion of the proceeds to payment of his secured debt, and would have had the benefit of the law of set-off as to the unsecured debt under s. 23 of the Act; and that the only remedy of the mortgagor or his assignee was by redemption before the sale, which would have deprived B. of the benefit of such set-off.

Stephens v. *Boisseau* .. .. .. xxvi., 437

10.—Debtor and Creditor—Security for Debt—Security Realized by Creditor — Appropriation of Proceeds — Res Judicata.

If a merchant obtains from a bank a line of credit on terms of depositing his customers' notes as collateral security, the bank is not obliged, so long as the paper so deposited remains uncollected, to give any credit in respect of it, but when any portion of the collaterals is paid it operates at once as payment of the merchant's debt, and must be credited to him.

Under the Judicature Act, estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded.

Cooper et al. v. *The Molsons Bank*, xxvi., 611 (Decision affirmed on appeal to Privy Council).

11.—Assignment for the Benefit of Creditors — Preferred Creditors — Moneys Paid Under Voidable Assignment—Liability of Assignee—Statute of Elizabeth—Hindering and Delaying Creditors.

In an action to have a deed of assignment for the benefit of creditors set aside by creditors of the assignor on the ground that it is void under the statute of Elizabeth, neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor or persons claiming under him can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them. *Cox* v. *Worrall* (26 N. S. Rep. 366), questioned.

Taylor v. *Cummings* .. .. .. xxvii., 589

12. — Insolvency — Fraudulent Preferences—Chattel Mortgage—Advances of Money — Solicitor's Knowledge of Circumstances—R. S. O. (1887) c. 124—54 Vic. c. 20 (Ont.)—58 Vic. c. 23 (Ont.).

In order to give a preference to a particular creditor, a debtor who was in insolvent circumstances, executed a chattel mortgage upon his stock in trade in favour of a money-lender, by whom a loan was advanced. The money, which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at one time paid over to the creditor who, at the same time, delivered to the solicitor, to be held by him as an escrow and dealt with as circumstances might require, a bond indemnifying the mortgagee against any loss under the chattel mortgage. The mortgagee had previously been consulted by the solicitor as to the loan, but was not informed that the transaction was being made in this manner to avoid the appearance of violating the acts respecting assignments and preferences, and to bring the case within the ruling in *Gibbons* v. *Wilson* (17 Ont. App. R. 1).

Held, that all the circumstances, necessarily known to his solicitor in the transaction of the busness, must be assumed to have been known to the mortgagee, and the whole affair considered as one transaction contrived to evade the consequences of illegally preferring a particular creditor over others, and that, under the circumstances, the advance made was not a *bonâ fide* payment of money within the meaning of the statutory exceptions.

Burns & Lewis v. *Wilson* .. xxviii., 207

13.—Assignment for Benefit of Creditors—Preferred Creditors — Money Paid Under Voidable Assignment—Levy and Sale under Execution—Statute of Elizabeth.

Where an assignment has been held void as against the statute, 13 Eliz. c. 5, and the result of such decision is that a creditor who had subsequently obtained judgment against the assignor, and notwithstanding the assignment, sold all the debtor's personal property so transferred, becomes entitled to all the personal property of the assignor levied upon him under his execution, such creditor has no legal right and no equity to an account or to follow moneys received by the assignee, or paid by him under such assignment in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible.

Cummings & Sons v. *Taylor et al.*, xxviii., 337

14.—Fraudulent Preferences—Transfer of Property—Delaying or Defeating Creditors—13 Eliz., c. 5.

A transfer of property to a creditor for valuable consideration, even with intent to prevent its being seized under execution at

the suit of another creditor, and to delay the latter in his remedies or defeat them altogether, is not void under 13 Eliz. c. 5, if the transfer is made to secure an existing debt and the transferee does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferor.

Mulcahy v. *Archibald* .. .. xxviii., 523

15.—Creditors of Company—Payment on Shares—Appropriation by Directors—Part treated as Paid up—Validity of.

See Company, 1.

16. — Prescription — Unpaid Note — Security for, by Deed—Novation.

See Prescription, 1.

17.—Assignment for Benefit of Creditors — Preference — Hindering and Delaying—Statute of Elizabeth.

See Chattel Mortgage, 3.

18.—Debt of Province of Canada to Dominion—Half-yearly Payment of Subsidies—Deduction of Interest—B. N. A. Act, ss. 112, 114, 115, 116, 118—36 Vic. c. 30 (D.)—47 Vic. c. 4 (D.).

See Constitutional Law, 10.

19.—Purchase of Land by Married Woman—Re-sale—Garnishee of Purchase Money — Debt of Husband — Statute of Elizabeth—Hindering or Delaying Creditors.

See Practice, 19.

20.—Vendor and Purchaser—Agreement for Sale of Lands—Assignment by Vendee—Principal and Surety—Deviation from Terms of Agreement—Giving Time — Creditor Depriving Surety of Rights—Secret Dealings with Principal—Release of Lands—Arrears of Interest—Novation—Discharge of Surety.

See Principal and Surety, 3.

21.—Execution—Sales under Execution—Equitable Rights — Unregistered Transfers—Registration — Real Property Act—R. S. C. c. 51; 51 Vic. (D.), c. 20.

See Registry Laws, 3.

22.—Chattel Mortgage—Existing Debt—Consideration—Purchase by Creditor.

See Chattel Mortgage, 7.

23.—Partnership—Division of Assets—Art. 1898 C. C.—Mandate—Debtor and Creditor—Account.

See Partnership, 8.

24.—Principal and Surety—Guarantee Bond—Default of Principal—Non-disclosure by Creditor.

See Principal and Surety, 4.

25.—Conveyance in Name of a Trustee—Fraudulent Device—Parties in Pari Delicto.

See Trusts, 9.

26.—Insolvency — Assignment — Preference—Payment in Money—Cheque of Third Party.

See Insolvency, 3.

27.—Assignment for the Benefit of Creditors—Affidavit of Bona Fides—Preferences—Distribution of Assets—Arbitration—Conditions of Deed—Statute of Elizabeth.

See Maguire v. *Hart* .. .. .. xxviii., 272

28.—Estoppel—Conveyance by Married Woman—Agreement—Recital.

See Fraudulent Conveyances.

29.—Married Woman — Separate Property—Conveyance—Contracts—C. S. N. B. c. 72.

See Married Woman, 3.

DEDICATION.

1.—Old Trails in Rupert's Land—Crown Grant — Squatter's Plan of Subdivision—Substitution of New Way—Dedication—Highway—Adopting New Street as a Boundary.

A squatter in possession of public lands near the old Hudson Bay Trading Post at Edmonton, who afterwards became patentee of the greater part of the lands he occupied, had made a plan of sub-division thereof into town lots, which showed a new roadway or street laid down in the place of the old travelled trail across said lands leading to the trading post, and subsequently, the Crown, in making grants, described several parcels of the lands in the patents as being bounded and abutting upon the said new street, or roadway, so laid down on the plan.

Held, affirming the decision of the Supreme Court for the North-West Territories, that the space so shown upon the plan, as laid

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out for a street, had been adopted and dedicated by the Crown as and for a public street and highway, in substitution for the old travelled trail or roadway across said lands.

Brown et al. v. *The Town of Edmonton*, 24th May, 1894 .. .. .. xxiii., 308; xxviii., 510

2. — CONSTITUTIONAL LAW — NAVIGABLE WATERS—TITLE TO BED OF STREAM—CROWN—DEDICATION OF PUBLIC LANDS—PRESUMPTION OF DEDICATION — USER—OBSTRUCTION TO NAVIGATION—PUBLIC NUISANCE—BALANCE OF CONVENIENCE.

See Navigable Waters, 1.

3.—MUNICIPAL CORPORATION — HIGHWAYS — OLD TRAILS IN RUPERT'S LAND—SUBSTITUTED HIGHWAY—NECESSARY WAY—R. S. C. c. 50, s. 108—RESERVATION IN CROWN GRANT — DEDICATION — USER — ESTOPPEL — ASSESSMENT OF LANDS CLAIMED AS HIGHWAY — EVIDENCE — PRESUMPTION.

See Highway, 3.

DEED.

1.—DESCRIPTION OF LAND—EXTENT—TERMINAL POINT—NUMBER OF RODS—RAILWAY CO.

A specific lot of land was conveyed by deed, and also: "A strip of land twenty-five links wide, running from the eastern side of the aforesaid lot along the northern side of the railway station about twelve rods unto the western end of the railway station ground, the said lot and strip together containing one acre, more or less."

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that the strip conveyed was not limited to twelve rods in length, but extended to the western end of the station, which was more than twelve rods from the starting point.

Doyle v. *McPhee* .. .. xxiv., 65

2.—CONSTRUCTION OF DEED — CONVEYANCE OF LAND — UNCERTAIN DESCRIPTION — EVIDENCE OF INTENTION—VERBA FORTIUS ACCIPUNTUR CONTRA PROFERENTEM — MAXIM APPLIED—PATENT AMBIGUITY.

A grant of land bounded by the bank of a navigable river, or an international waterway, does not extend *ad medium filum* as in the case of a non-navigable river.

If in a conveyance of land the description is not certain enough to identify the locus it is to be construed according to the language of the instrument, though it may result in the grantor assuming to convey more than his title warranted.

The intention of the parties to a deed is paramount and must govern regardless of consequences. *Res magis valeat quam pereat* is only a rule to aid in arriving at the intention, and does not authorize the Court to override it.

A general description of land as being part of a specified lot must give way to a particular description by boundaries, and, if necessary, the general description will be rejected as *falsa demonstratio*.

Where there is an ambiguity on the face of a deed incapable of being explained by extrinsic evidence the maxim *verba fortius accipiuntur contra proferentem* cannot be applied in favour of either party.

Where a description is such that the point of commencement cannot be ascertained it cannot be determined at the election of the grantee.

Barthel v. *Scotton* .. .. xxiv., 367

3.—MORTGAGE OF TRUST ESTATE—EQUITY RUNNING WITH ESTATE—EQUITABLE RECOURSE — CONSTRUCTION OF DEED — DESCRIPTION OF LANDS — FALSA DEMONSTRATIO—WATER LOTS—ACCRETION TO LANDS—AFTER ACQUIRED TITLE—CONTRIBUTION TO REDEEM—DISCHARGE OF MORTGAGE—PAROL EVIDENCE TO EXPLAIN DEED—ESTOPPEL BY DEED.

On the dissolution of the firm of A. & Co. by the retirement of C. D. A. the business was carried on by the remaining partners T. A. and B. A., on the same premises, which were the property of C. D. A., the continuing partners agreeing to pay off a mortgage thereon as one of the old firm's debts. They neglected to pay, and the property was sold by the sheriff under a foreclosure decree, when they purchased and took a deed describing the lands as in said mortgage, one side being bounded by "the windings of the shore" of Sydney Harbour, and including a "water lot," part of which was known as the "Stone ballast heap," in front of the shore lands. They immediately re-mortgaged the lands by the same description, adding a further or alternative description, and, at the end, the following words:—"Also all and singular the water lots and docks in front of the said lots," —although in fact they then owned none except those covered by the description in the deed from the sheriff, and they gave at the same time a collateral bond to the mortgagees for the amount of their mortgage. They then conveyed the equity to C. D. A., giving

him a bond of indemnity against the mortgage they had so executed. Some time afterwards T. A. and B. A. acquired by grant certain other water lots in front of the mortgaged property, and used and occupied them as part of their business premises along with the mortgaged lands. C. D. A. sold the equity of redemption subject to the mortgage, and T. A. and B. A. settled their obligation under the indemnity bond by a compromise with the assignees of C. D. A., paying $8,000, and obtained their discharge. Upon proceedings being taken by the assignees of the mortgagees to foreclose the mortgage, and against T. A. and B. A. upon the collateral bond, T. A. and B. A. paid the amount due, and the foreclosure proceedings were continued for their benefit.

Held, that the liability of the mortgagors was fully satisfied and discharged by the compromise, and as they were afterwards obliged to pay the outstanding encumbrance they were entitled to take an assignment and enforce the mortgage by foreclosure proceedings against the lands.

Per Gwynne, J. The mortgagors were only entitled to foreclosure for the realization of the amount actually paid by them in compromising their liability under the indemnity bond.

Held, further, that as the construction of the mortgage depended upon the state of the property at the time it was made, parol evidence would be admitted to explain the ambiguity in the description of the lands intended to be affected: that as there were no specified descriptions or recitals tending to show that any other property was intended to be covered by the mortgage beyond what would be satisfied by including the water lot described as the "Stone ballast heap," the after-acquired water lots would not be charged or liable to contribute ratably towards redemption of the mortgage; that even admitting that the description was sufficient to include the after-acquired property, such property was not liable to contribute towards payment of the mortgage debt.

Imrie v. *Archibald et al.* .. .. xxv., 368

4.—Contract—Subsequent Deed — Inconsistent Provisions.

C., by agreement of April 6th, 1891, agreed to sell to the Erie County Gas Co., all his gas grants, leases and franchises, the company agreeing, among other things, to "reserve gas enough to supply the plant now operated or to be operated by them on said property." On April 20th a deed was executed and delivered to the company, transferring all the leases and property specified in said agreement, but containing no reservation in favour of C. such as was contained therein. The Erie Company, in 1894, assigned the property transferred by said deed to the Provincial Natural Gas and Fuel Company, who immediately cut off from the works of C. the supply of gas, and an action was brought by C. to prevent such interference.

Held, affirming the decision of the Court of Appeal, that as the contract between the parties was embodied in the deed subsequently executed the rights of the parties were to be determined by the latter instrument, and as it contained no reservation in favour of C. his action could not be maintained.

Carroll v. *Provincial Natural Gas and Fuel Company of Ontario* .. .. xxvi., 181

5.—Registry Laws—Registered Deed—Priority over Earlier Grantee—Postponement—Notice.

To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice, sufficient to make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent, is indispensable.

The New Brunswick Railway Company v. *Kelly* .. .. xxvi., 341

6.—Construction of Deed—Title to Lands—Ambiguous Description—Evidence to Vary or Explain Deed—Possession—Conduct of Parties — Presumptions from Occupation of Premises—Arts. 1019, 1238, 1242, 1473, 1599 C. C.—47 Vic. c. 87, s. 3 (D.); 48 & 49 Vic. c. 58, s. 3 (D.)—45 Vic. c. 20 (Q.).

By a deed made in August, 1882, the appellant ceded to the Government of Quebec, who subsequently conveyed to the respondent, an immovable described as part of lot No. 1937, in St. Peter's Ward in the City of Quebec, situated between the streets St. Paul, St. Roch, Henderson and the river St. Charles, with the wharves and buildings thereon erected. The respondents entered into possession of the lands by virtue of said deeds and remained in possession for twelve years, without objection to the boundaries. They then brought an action to have it declared that, by the proper construction of the deeds, an additional strip of land and certain wharves were included and intended to be transferred. They contended that the description in the deed was ambiguous, and

that Henderson street as a boundary should be construed as meaning Henderson Street extended, and they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of August, 1882.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, the Chief Justice and King, J., dissenting, that the words "Henderson Street" as used in the deed must be construed in their plain natural sense as meaning the street of that name actually existing on the ground; that the correspondence was not shown to contain all the negotiations or any finally concluded agreement, and could not be used to contradict or modify the deed which should be read as containing the matured conclusions at which the parties had finally arrived: that the deed should be interpreted in the light of the conduct of the parties in taking and remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence; and that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, and in favour of the vendors.

The City of Quebec v. *The North Shore Railway Company* .. .. xxvii., 102

7.—Nullified Deed—Compromise—Transaction — Estoppel — Admission — Evidence.

A deed was entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation, but failed to attain its end, and was annulled and set aside by order of the Court, as being in contravention of article 311 of the Civil Code of Lower Canada.

Held, Girouard, J., dissenting, that upon the nullification of the deed no allegation contained in it could subsist even as an admission.

Durocher v. *Durocher* .. .. xxvii., 363

8.—Construction of Deed — Servitude — Roadway—User—Art. 549 C. C.

In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed, to which they all were parties, they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards, the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his *auteurs*, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain, and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way.

In an action (*négatoire*) to prohibit further use of the way;

Held, affirming the decision of the Court of Queen's Bench, that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands so far as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain.

Riou v. *Riou* .. .. xxviii., 53

9.—Form of Title to Lands—Signature by a Cross—19 Vic. c. 15, s. 4 (Can.)—Registry Laws—Evidence—Commencement of Proof—Arts. 1025, 1027, 1472, 1480, 1487, 1582, 1583, 2134, 2137, C. C.

Where the registered owner of lands was present, but took no part in a deed subsequently executed by the representative of his vendor granting the same lands to a third person, the mere fact of his having been present raises no presumption of acquiescence or ratification thereof.

The conveyance by an heir at law of real estate which had been already granted by his father during his lifetime is an absolute nullity, and cannot avail for any purposes whatever against the father's grantee, who is in possession of the lands, and whose title is registered.

Writings under private seal which have been signed by the parties, but are ineffective on account of defects in form, may nevertheless avail as a commencement of proof in writing to be supplemented by secondary evidence.

Powell v. *Watters* .. .. .. xxviii., 133

10.—Mortg
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10.—Mortgage, Construction of—Trade Fixtures — Chattels — Tools and Machinery of a "Going Concern"—Constructive Annexation — Mortgagor and Mortgagee.

The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of moveable articles in permanent structures, with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly affixed, but in a manner appropriate to their use, and shewing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises, or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that both as to the degree and object of the annexation, they became parts of the realty.

Haggart v. *Town of Brampton* .. xxviii., 174

11.—Mortgage—Married Woman—Implied Covenant—Disclaimer.

Where a deed of lands to a married woman, but which she did not sign, contained a recital that as part of the consideration the grantee should assume and pay off a mortgage debt thereon, and a covenant to the same effect with the vendor, his executors, administrators and assigns, and she took possession of the lands and enjoyed the same, and the benefits thereunder, without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that, in assenting to take under the deed, she bound herself to the performance of the obligations therein stated to have been undertaken upon her behalf, and an assignee of the covenant could enforce it against her separate estate.

Small v. *Thompson* .. .. .. xxviii., 219

12.—Undue Influence—Valuable Consideration—Setting Aside Deed.

See Evidence, 1.

13.—Sale of Land—Building Restrictions — Description — Street Boundaries — Construction of Covenant.

See Contract, 2.

14. — Land in Adjoining Counties — Possession—Title by Prescription.

See Title to Land, 5.

15. — Obligation — Constitution d'Hypotheque—Security for Unpaid Note—Novation—Prescription.

See Prescription, 1.

16. — Construction of Deed — Sale of Phosphate Mining Rights—Option to Purchase other Minerals while Working—Exercise of Option.

See Contract, 15.

17.—Locus Regit Actum—Lex Domicilii—Lex Rei Sitae—Form of Instruments Executed Abroad.

See Will, 8.

18. — Agreement to Charge Lands — Statute of Frauds.

See Mortgage, 5.

19.—Title to Lands—Seignorial Tenure—Deed of Concession—Construction of Deed — Words of Limitation — Covenant by Grantee — Charges Running with the Title—Servitude—Condition, si Voluero—Prescriptive Title—Edits & Ordonnances (L. C.)—Municipal Regulations—23 Vic. (Can.) c. 85.

See Servitude, 2.

20.—Sale by Sheriff—Folle Enchere—Registration—Nullity.

See Appeal, 56.

21.—Building Society—Assessments on Loans—Administrators and Trustees—Sales to—Nullity—Art. 1484 C. C.

See Building Society.

22.—Sale—Donation in Form of—Gifts in Contemplation of Death — Mortal Illness of Donor—Presumption of Nullity—Validating Circumstances—Consideration—Dation en Paiement Arts. 762, 989 C. C.

See Sale, 9.

23.—Assignment for the Benefit of Creditors — Preferred Creditors — Money Paid under Voidable Assignment—Liability of Assignee—Statute of Elizabeth—Hindering and Delaying Creditors.

See Assignment, 3.

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DELIVERY.

MORTGAGE—MINING MACHINERY—REGISTRATION — FIXTURES — INTERPRETATION OF TERMS — BILL OF SALE — PERSONAL CHATTELS—R. S. N. S. (5 SER.) C. 92, SS. 1, 4 AND 10 (BILLS OF SALE)—55 VIC. (N. S.) C. 1, S. 143 (THE MINES ACT)—41 & 42 VIC. (N. S.) C. 31, S. 4.

See Mortgage, 7.

DESCRIPTION OF LANDS.

MORTGAGE OF TRUST ESTATE — EQUITY RUNNING WITH ESTATE—EQUITABLE RECOURSE—CONSTRUCTION OF DEED—DESCRIPTION OF LANDS—FALSA DEMONSTRATIO—WATER LOTS—ACCRETION TO LANDS — AFTER-ACQUIRED TITLE — CONTRIBUTION TO REDEEM—DISCHARGE OF MORTGAGE—PAROL EVIDENCE TO EXPLAIN DEED—ESTOPPEL BY DEED.

See Deed, 3.

DEVISE.

1. — FORFEITURE — DEATH OF TESTATOR CAUSED BY DEVISEE—FELONIOUS ACT.

See Criminal Law, 4.

2.— WILL—CONSTRUCTION OF — EXECUTORY DEVISE OVER—CONTINGENCIES—"DYING WITHOUT ISSUE" — REVERT — DOWER — ANNUITY—CONDITIONS IN RESTRAINT OF MARRIAGE.

See Will, 10.

3.—WILL—DEVISE TO TWO SONS—DEVISE OVER OF ONE'S SHARE—CONDITION—CONTEXT—CODICIL.

See Codicil, 2.

DISCLAIMER.

MORTGAGE — MARRIED WOMAN — IMPLIED COVENANT.

See Married Woman, 3.

DISCRETION.

APPEAL — JURISDICTION — DISCRETIONARY ORDER—DEFAULT TO PLEAD—R. S. O. C. 135, SS. 24 (*a*) AND 27—R. S. O. C. 44, S. 65—ONTARIO JUDICATURE ACT, RULE 796.

See Appeal, 65.

DISSEISIN.

CROWN GRANT—DESSEISIN OF GRANTEE—TORTIOUS POSSESSION — STATUTE OF MAINTENANCE—32 HEN. VIII., C. 9—ESTOPPEL.

See Title to Land, 3.

DISTRESS.

LANDLORD AND TENANT—R. S. O. (1887) C. 143, S. 28—CONSTRUCTION OF STATUTE—DISTRESS—GOODS OF PERSON HOLDING "UNDER" TENANT—ESTOPPEL.

The Ontario Landlord and Tenant Act (R. S. O., 1887, c. 143, s. 28), exempts from distress for rent the property of all persons except the tenant or persons liable. The word "tenant" includes a sub-tenant, assignees of the tenant and any person in actual occupation under or with consent of the tenant.

Held, reversing the judgment of the Court of Appeal, that persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees, and without authority to let or grant possession of them, were not in occupation "under" the said assignees, and their goods were not liable to distress.

Farewell et al. v. *Jameson* .. .. xxvi., 588

DISTRIBUTION.

See Judgment of Distribution.

DOMINION LANDS.

See Crown Lands.

DONATION.

SALE—DONATION IN FORM OF—GIFTS IN CONTEMPLATION OF DEATH — MORTAL ILLNESS OF DONOR—PRESUMPTION OF NULLITY—VALIDATING CIRCUMSTANCES—DATION EN PAIEMENT—ARTS. 762. 989 C. C.

See Sale, 9.

DON MUTUEL.

BY MARRIAGE CONTRACT—PROPERTY EXCLUDED FROM—SUBSEQUENT ACQUISITION—RESILIATION FOR VALUE—DEATH OF HUSBAND—RIGHT OF WIDOW TO POSSESSION.

See Marriage Settlement.

DOWER.

CONSTRUCTION OF WILL—EXECUTORY DEVISE OVER — CONTINGENCIES — "DYING WITHOUT ISSUE" — "REVERT" — ANNUITY—ELECTION BY WIDOW—DEVOLUTION OF ESTATES ACT. 49 VIC. (O.) C. 22—CONDITIONS IN RESTRAINT OF MARRIAGE—"THE WILLS ACT OF ONTARIO." R. S. O. (1887) C. 109. S. 30.

See Will, 10.

DRAINAGE.

1.—By-law—Drainage Act—Petition for Drain—Withdrawal of Name From—Improper Construction.

The action was brought by Gibson to have a by-law of the corporation quashed, or, in the alternative, for damages for injury to his property, resulting from improper construction and want of repair of a drain made under said by-law. The ground upon which said by-law was attacked was that the plaintiff had withdrawn from the petition and there were not sufficient names on it without him.

The trial Judge held that plaintiff had not withdrawn from the petition, and refused to quash the by-law. He also held that plaintiff had failed to prove his allegations in the statement of claim on which his right to damages was founded. The Divisional Court reversed this decision on the first ground, and held the by-law invalid. The Court of Appeal for Ontario (21 Ont. App. R. 504), restored the original judgment.

The Supreme Court of Canada affirmed the judgment appealed from and dismissed the appeal with costs.

Gibson v. *The Township of North Easthope*, 22nd March, 1895 .. .. xxiv., 707

2.—Municipal Law—Drains and Watercourses—Assessment—Intermunicipal Obligations as to Initiation and Contributions—By-law—Ontario Drainage Act of 1873—36 Vic. c. 38—(O.)—36 Vic. c. 39 (O.)—R. S. O. (1887) c. 184—Ontario Consolidated Municipal Act of 1892—55 Vic. c. 42 (O.)-

The provisions of the Ontario Municipal Act (55 Vic. c. 42, s. 590), that if a drain constructed in one municipality is used as an outlet, or will provide an outlet for the water of lands of another, the lands in the latter so benefited may be assessed for their proportion of the cost, applies only to drains properly so called, and does not include original watercourses which have been deepened or enlarged.

If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost, a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law.

Broughton v. *Grey and Elma* .. xxvii., 495

3.—Adjoining Municipalities — Defective Scheme — Tort Feasors — Drainage Trials Act, 54 Vic. c. 51—Powers of Referee—Negligence.

See Municipal Corporation, 10.

4.—Award by Drainage Referee—Appeal—Jurisdiction—54 Vic. c. 51 (Ont.).

See Appeal, 32.

5.—R. S. O. (1887) c. 220—Requisition for Drain—Owner of Land—Meaning of Term "Owner."

See Municipal Corporation, 13.

6.—Municipal By-law—Special Assessments—Powers of Councils as to Additional Necessary Works — Ultra Vires Resolutions—Executed Contract.

See Municipal Corporation, 24.

7.—Aggravation of Natural Servitude—Flow of Water—Sewage—Lands on Lower Level — Damages — Art. 501 C. C.

See Easement, 1.

8.—Assessment—Extra Cost of Intermunicipal Works—R. S. O. (1877) c. 174—46 Vic. c. 18 (Ont.)—By-law—Repairs—Misapplication of Funds—Negligence—Damages.

See Watercourses, 1.

9.—Easement—Adjoining Proprietors of Land—Injury by Surface Water—Different Levels.

See Watercourses, 2.

DUTY, STATUTABLE.

Master and Servant — Negligence — "Quebec Factories Act"—R. S. O. Arts. 3035 to 3058—C. C. Art. 1053—Civil Responsibility—Accident, Cause of—Conjecture — Evidence — Onus of Proof—Statutable Duty, Breach of—Police Regulations.

See Master and Servant, 7.

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"DYING WITHOUT ISSUE."

1.—Will, Construction of—Executory Devise Over—Conditional Fee—Life Estate—Estate Tail.

A testator died in 1856, having previously made his last will, divided into numbered paragraphs by which he devised his property amongst certain of his children. By the third clause he devised lands to his son F. on attaining the age of 21 years—"giving the executors power to lift the rent and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of 21 years, and by a subsequent clause he provided that "at the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors." F. attained the age of 21 years and died in 1893, unmarried and without issue.

Held, that neither the form nor the language used in the will would authorize a departure from the general rule as to construction according to the ordinary grammatical meaning of the words used by the testator, and that, as there would be no absurdity, repugnance or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to all the property devised to the testator's sons and daughters by the preceding clauses of the will.

Held, further, that the gift over should be construed as having reference to failure of issue at the death of the first devisee, who thus took an estate in fee subject to the executory devise over.

Crawford et al. v. *Broddy et al.*, xxvi., 345

2.—Construction of Will — Executory Devise Over — Contingencies — "Revert" — Dower—Annuity — Election by Widow—Devolution of Estates Act—48 Vic. (O.) c. 28—Conditions in Restraint of Marriage—"The Wills Act of Ontario," R. S. O. (1887) c. 109, s. 30.

See Will, 10.

3.—Will—Devise to two Sons—Devise Over of One Share—Condition—Context—Codicil.

See Codicil, 2.

4.—Statute, Construction of — Estates Tail, Acts Abolishing—R. S. N. S. (1 ser.) c. 112—R. S. N. S. (2 ser.) c. 112—R. S. N. S. (3 ser.) c. 111—23 Vic. c. 2 (N. S.) — Will — Construction of — Executory Devise Over — "Dying without Issue"—"Lawful Heirs"—"Heirs of the Body"—Estate in Remainder Expectant — Statutory Title—R. S. N. S. (2 ser.) c. 114, ss. 23 and 24—Title by Will—Conveyance by Tenant in Tail.

See Will, 17.

5.—Will—Construction of — Words of Futurity—Life Estate—Joint Lives—Time for Ascertainment of Class—Survivor Dying without Issue—"Lawful Heirs."

See Will, 18.

EASEMENT.

1.—Aggravation of Natural Servitude—Damages—Drainage—Art. 501 C. C.

The proprietor of a superior tenement, who has increased and aggravated the servitude appurtenant thereto, over adjoining lands of a lower level remains liable for damages resulting therefrom, notwithstanding that he has complied with the directions of the judgment declaring the aggravation by the reconstruction in a proper manner of the drain by which the natural servitude had been increased.

Vineberg et vir v. *Hampson*, 27th February, 1896.

2.—Necessary Way — Implied Grant — User—Obstruction of Way — Interruption of Prescription — Acquiescence—Limitation of Actions—R. S. N. S. (5 ser.) c. 112—R. S. N. S. (4 ser.) c. 100—2 & 3 Wm. IV. (Imp.), c. 71, ss. 2 and 4.

K. owned lands in the County of Lunenburg, N. S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road, for hauling fuel from his wood-lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, and the way was not used

at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed, and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff. The statute (R. S. N. S. 5 ser., c. 112), provides a limitation of twenty years for the acquisition of easements, and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same.

Held, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute.

Held, also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would without special grant pass by implication, upon the severance of the tenements.

Knock v. *Knock* .. .. .. xxvii., 664

3.—Deed—Construction of — Servitude—Roadway—User—Art. 549 C. C.

In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed to which they all were parties they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his *auteurs*, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain, and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way.

In an action (*négatoire*) to prohibit further use of way:

Held, affirming the decision of the Court of Queen's Bench, that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchaser was merely to establish servitudes across their respective lands so far as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain.

Riou v. *Riou* .. .. xxviii., 53

4.—Adjoining Proprietors of Land—Different Levels—Injury by Surface Water—Watercourse.

O. and S. were adjoining proprietors of land in the village of Frankford, Ont., that of O. being situate on a higher level than the other. In 1875 improvements were made to a drain discharging upon the premises of S., and a culvert was made connecting with it. In 1887, S. erected a building on his land and cut off the wall of the culvert, which projected over the line of the street, which resulted in the flow of water through it being stopped and backed up on the land of O., who brought an action against S. for the damage caused thereby.

Held, that S. having a right to cut off the part of the culvert which projected over his land was not liable to O. for the damage so caused, the remedy of the latter, if he had any, being against the municipality for not properly maintaining the drain.

Ostrom v. *Sills et al.* .. .. .. xxviii., 485

5. — Trespass — Damages — Equitable Interest—Municipal By-law—Registration—Notice—R. S. O. (1877) c. 114.

See Municipal Corporation, 21.

And *see* Servitude.

EDUCATION.

1.—Powers of Provincial Legislatures—Manitoba Constitution—Rights Prejudicially Affected—33 Vic. c. 3, s. 22, s.-s. 2—B. N. A. Act, s. 93 s.s. 3.

See Constitutional Law, 3.

2.—School Corporation — Decision of Superintendent of Public Instruction—Appeal—Final Judgment—Mandamus—Practice.

See Mandamus, 1.

ELECTION LAW.

1.—Election Petition—Appeal—Dissolution of Parliament—Abatement of Proceedings—Return of Deposits—Payment out of Court Below—Practice.

In the interval between the taking of an appeal from the decision in the matter of a controverted election, and the sittings of the Supreme Court of Canada, when the appeal was to have been heard, Parliament was dissolved, and the petition was dropped and declared to have abated in consequence, by the judgment of His Lordship Mr. Justice Patterson, sitting as a Judge of the Supreme Court of Canada in Chambers, (19 Can. S. C. R. 557). During a subsequent session of the Supreme Court, a motion was made on behalf of the petitioner for an order directing payment out of the Court below of the deposit made in that Court as security for the costs of the petition, and also of the further deposit made in said Court below as security for the costs of the appeal to the Supreme Court.

Held, that the petitioner was entitled to a special order declaring and ordering that the moneys so deposited should be paid to the petitioner out of the said Court below.

The Halton Election Case—Lush v. *Waldie*, 15th March, 1893.

2.—Election Petition—Separate Trials—R. S. C. c. 9, ss. 30 and 50—Jurisdiction.

Two election petitions were filed against the appellant, one by A. C., filed on the 4th April, 1892, and the other by A. V., the respondent, filed on the 6th April, 1892. The trial of the A. V. petition was by an order of a Judge in Chambers, dated the 22nd September, 1892, fixed for the 26th October, 1892. On the 24th October the appellant petitioned the Judge in Chambers to join the two petitions and have another date fixed for the trial of both petitions. This motion was referred to the Trial Judges, who, on the 26th October, before proceeding with the trial, dismissed the motion to have both petitions joined and proceeded to try the A. V. petition. Thereupon the appellant objected to the petition being tried then as no notice had been given that the A. C. peition had been fixed for trial, and, subject to such objection, filed an admission that sufficient bribery by the appellant's agent without his knowledge had been committed to avoid the election. The Trial Judges then delivered judgment setting aside the election.

On an appeal to the Supreme Court,

Held, 1st. That under sec. 30 of chap. 9, R. S. C., the Trial Judge had a perfect right to try the A. V. petition separately.

2nd. That the ruling of the Court below on the objection relied on in the present appeal, viz.: That the Trial Judges could not proceed with the petition in this case, because the two petitions filed had not been bracketed by the Prothonotary as directed by sec. 30 of chap. 9, R. S. C., was not an appealable judgment or decision. (R. S. C. c. 9, s. 50). Sedgewick, J., doubting.

The Vaudreuil Election Case .. .. xxii., 1

3.—Election Petition — Service—Copy—Status of Petitioner—Preliminary Objection.

On the hearing of preliminary objections to an election petition to prove the status of the petitioner a list of voters was offered with a certificate of the Clerk of the Crown in Chancery, which, after stating that said list was a true copy of that finally revised for the district, proceeded as follows: "And is also a true copy of a list of voters which was used at said polling division at and in relation to an electon of a member of the House of Commons of Canada for the said electoral district * * * which original list of voters was returned to me by the returning officer for said electoral district in the same plight and condition as it now appears, and said original list of voters is now on record in my office."

Held, that this was, in effect, a certificate that the list offered in evidence was a true copy of a paper returned to the Clerk of the Crown by the returning officer as the very list used by the deputy returning officer at the polling district in question, and that such list remained of record in possession of said clerk. It was then a sufficient certificate of the paper offered being a true copy of the list actually used at the election. *Richelieu Election Case* (21 Can. S. C. R. 168), followed.

Winnipeg Election Case. Macdonald Election Case .. .. xxvii., 201

4.—Appeal—Election Petition—Preliminary Objection—Delay in Filing—Objections Struck Out—Order in Chambers—R. S. C. c. 8, s. 50.

The Supreme Court refused to entertain an appeal from the decision of a Judge in Chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections within sec. 50 of the Controverted

Election Act, and if it were, no judgment on the motion could put an end to the petition.

West Assiniboia Election Case .. xxvii., 215

5.—Appeal—Preliminary Objections — R. S. C. c. 9, ss. 12 and 50—Order Dismissing Petition—Affidavit of Petitioner.

The appeal given to the Supreme Court of Canada by The Controverted Elections Act (R. S. C. c. 9, s. 50), from a decision on preliminary objections to an election petition can only be taken in respect to objections filed under sec. 12 of the Act. No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue.

Marquette Election Case .. .. xxvii., 219

6. — Election Petition — Preliminary Objections—Affidavit of Petitioner—Bona Fides—Examination of Deponent—Form of Petition—R. S. C. c. 9—54 & 55 Vic. c. 20, s. 3 (D.).

By 54 & 55 Vic. c. 20, s. 3, amending The Controverted Elections Act (R. S. C. c. 9), an election petition must be accompanied by an affidavit of the petitioner "that he has good reason to believe and verily does believe that the several allegations contained in the said petition are true." The petitioner in this case used the exact words of the Act in his affidavit.

Held, that the respondent to the petition was not entitled on the hearing on preliminary objections to examine him as to the grounds of his belief.

Held, further, that it was not necessary that the petition should be annexed to or otherwise identified by the affidavit, as in case of an exhibit, the references in the affidavit being sufficient to show what petition was referred to.

It is no objection to an election petition that it is too general (as by the Act it may be in any prescribed form) if it follows the form that has always been in use in the province. Moreover, any inconvenience from generality may be obviated by particulars.

Lunenburg Election Case .. .. xxvii., 226

7. — Election Petition — Preliminary Objections — Service of Petition — Bailiff's Return—Cross-Examination—Production of Copy.

A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member is a sufficient return. It need not state by whom the copies were certified. (Articles 56 and 78 C. C. P.).

Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence.

Beauharnois Election Case .. xxvii., 232

8. — Controverted Election — Corrupt Treating — Agent of Candidate — Limited Agency—Trivial or Unimportant Corrupt Act—54 & 55 Vic. c. 20, s. 19 (D.)—Benefit of.

During an election liquor was given to an elector, who at the same time was asked to vote for a particular candidate.

Held, that this was corrupt treating under section 86 of the Dominion Elections Act, R. S. C. c. 8.

If a political association is formed for a place within the electoral district, and it is not shown that there was any restriction on the members to work for their candidate within the limits of that place only, they are his agents throughout the whole district.

Though the only corrupt act proved against a sitting member was of a trivial and unimportant character, and he had at public meetings warned his supporters against the commission of illegal acts, yet as such act was committed by an agent whom he had taken with him to canvass a certain locality, and there were circumstances which should have aroused his suspicion, he should have given a like warning to this agent, and not having done so he was not entitled to the benefit of the amendment to The Controverted Elections Act in 54 & 55 Vic. c. 20, s. 19.

West Prince Election Case .. .. xxvii., 241

9. — Election Petition — Preliminary Objections—Filing of Petition—Construction of Statute—R. S. C. c. 9, s. 9 (*b*)—54 & 55 Vic. c. 20, s. 5 (D.)—R. S. C. c. 1, s. 7, ss. 27—Interpretation of Words and Terms—Legal Holiday.

When the time limited for presenting a petition against the return of a member of the House of Commons of Canada expires or falls upon a holiday, such petition may be effectively filed upon the day next following which is not a holiday.

The Nicolet Election Case, 21st Nov., 1898, xxix.

Memo.—An application for leave to appeal in this case was refused by the Privy Council, 24th February, 1899.

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10.—Libel—Slander — Privileged Statements — Public Interest — Charging Corruption Against Political Candidate—Challenging to Sue—Costs.

See Costs, 3.

EMINENT DOMAIN.

1.—Appeal—Jurisdiction—Title to Lands —Municipal Law—By-law—Widening Streets—Expropriation—R. S. C. c. 135, s. 29 (*b*)—54 & 55 Vic. c. 25, s. 3—56 Vic. c. 29, s. 1.

In an action to quash a by-law passed for the expropriation of land, the controversy relates to a title to lands, and an appeal lies to the Supreme Court of Canada, although the amount in controversy is less than $2,000.

The judgment on the merits dismissed the appeal for the reasons stated in the judgment of the Court below. (See Q. R. 6 Q. B. 345).

Murray v. *Town of Westmount* .. xxvii., 579

2. — Public Work — Construction of Trestles — Interference with Private Property—Injury Caused by the Works—Damages Peculiar to the Property in Question—Compensation.

See Public Work, 2.

3.—Crown—Construction of Public Work —Interference with Public Rights—Injury to Private Owner.

See Public Work, 1.

4. — Railway Expropriations — Arbitration—Death of Arbitrator—Lapse of Time for Award.

See Railways, 16.

5.—Old Trails in Rupert's Land—Substituted Highway — Necessary Way — Reservation in Crown Grant — Dedication — User — Estoppel — Evidence.

See Highway, 3.

6.—Highways—Old Trails in Rupert's Land—Substitution of New Way—Dedication of Highway.

See Highway, 4.

7.—Railways—Eminent Domain — Expropriation of Lands — Arbitration — Evidence—Findings of Fact—Duty of Appellate Court—51 Vic. c. 29 (D.).

See Railways, 18.

EMPLOYER'S LIABILITY.

See Master and Servant.

" Negligence.

ENVOIE EN POSSESSION.

Testamentary Executors — Succession — Balance Due by Tutor—Practice— Action for Account — Provisional Possession—Envoie en Possession — Parties—Extra Judicial Consent to Form of Action.

See Executors, 2.

EQUITY OF REDEMPTION.

Mortgage — Loan to Pay off Prior Incumbrance—Interest — Assignment of Mortgage—Purchase of Equity of Redemption—Accounts.

See Mortgage, 8.

ERROR.

Vendor and Purchaser—Principal and Agent — Mistake—Contract—Agreement for Sale of Land—Agent Exceeding Authority—Specific Performance—Findings of Fact.

See Contract, 43.

And *see* Mistake,.

ESTOPPEL.

1.—Life Insurance — Wagering Policy —Nullity—Waiver of Illegality—Insurable Interest—Estoppel—14 Geo. III., c. 48 (Imp.)—Arts. 2474, 2480, 2590 C. C.

A condition in a policy of life insurance by which the policy is declared to become incontestable upon any ground whatever after the lapse of a limited period, does not make the contract binding upon the insurer in the case of a wagering policy.

Judgment of the Court of Queen's Bench reversed, Sedgewick, J., dissenting.

The Manufacturers Life Insurance Co. v. *Anctil* .. .. xxviii., 103

2.—Bona Fides—Conveyance by Married Woman—Agreement—Recital.

B., a married woman, in order to carry out an agreement between her husband and his creditors consented to convey to the creditor a farm, her separate property, in consideration of the transfer by her husband to her of the stock and other personal property on, and of indemnity against her personal

liability on a mortgage against said farm. The conveyance, agreement and bill of sale of the chattels were all executed on the same day the agreement, to which B. was not a party, containing a recital that the husband was owner of the said chattels, but giving the creditor no security upon them. The chattels having subsequently been seized under execution against the husband it was claimed, on interpleader proceedings, that the bill of sale was in fraud of the creditor.

Held, affirming the decision of the Court of Appeal, that the recital in the agreement worked no estoppel as against B.; that as it appeared that the husband expressly refused to assign the chattels to his creditor there was nothing to prevent him from transferring them to his wife, and that the Court of Appeal rightly held the transaction an honest one, and B. entitled to the goods and to indemnity against the mortgage.

Boulton et al. v. *Boulton* .. .. xxviii., 592

3.—Company — Forfeiture of Charter — Estoppel—Compliance with Statute—Action—Res Judicata.

In an action against a River Improvement Company for repayment of tolls alleged to have been unlawfully collected it, was alleged that the dams, slides, etc., for which tolls were claimed were not placed on the properties mentioned in the letters patent for the company; that the company did not comply with the statutory requirements that their works should be completed within two years from the date of incorporation, whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters, contrary to the provisions of the Timber Slide Company's Act, and could not exact tolls in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands whose report was to be accepted in place of that provided for by the Timber Slide Company's Act, and to be acted upon by the Commissioner in fixing the schedule of tolls.

Held, affirming the judgment of the Court of Appeal for Ontario, that the above grounds of impeachment were covered by the consent judgment, and were *res judicata*.

Held, further, that plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the Commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited.

By R. S. O. (1887) c. 160, s. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation it should forfeit all its corporate and other powers, unless further time is granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the Commissioner of Public Works.

Semble.—The non-completion of the works within two years would not *ipso facto*, forfeit the charter, but only afford grounds for proceedings by the Attorney-General to have a forfeiture declared.

Hardy Lumber Co. v. *Pickerel River Improvement Co.*, 14th Dec., 1898 xxix

4.—Sheriff—Trespass—Sale of Goods by Insolvent—Bona Fides—Judgment of Inferior Tribunal—Res Judicata—Bar to Action—Fraudulent Preferences—Pleading.

See Res Judicata, 1.

5.—Trespass to Mortgaged Property—Practice—Parties to Action—Mortgagee in Possession—Sale of Property to Trespasser.

See Mortgage, 1.

6.—Conveyance to Married Woman—Effect of Execution of, by Husband—Assent.

See Title to Land, 3.

7.—Trustee—Administrator of Estate—Release by Next of Kin—Recession of Release — Laches — Estoppel — Delays.

See Trusts, 5.

8.—Trustees and Administrators — Fraudulent Conversion — Past due Bonds—Debentures Transferable by Delivery — Equity of Previous Holders — Implied Notice — Innocent Holder for Value.

See Pledge.

9.—Estoppel by Deed.

See Deed, 3.

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10.—Canada Temperance Act — Search Warrant—Magistrate's Jurisdiction—Constable — Justification of Ministerial Officer—Goods in Custodia Legis—Replevin—Res Judicata—Judgment Inter Partes.

See Canada Temperance Act, 2.

11.—Nova Scotia Probate Act—R. S. N. S. (5 ser.) c. 100 and 51 Vic. (N. S.) c. 26—Executors and Administrators—License to Sell Lands—Res Judicata.

See Res Judicata, 8.

12.—Foreign Judgment — Res Judicata — Judgment Obtained After Action Begun—R. S. N. S. (5 ser.) c. 104, s. 12.

See Res Judicata, 4.

13.—Fire Insurance—Contract—Termination—Notice—Statutory Conditions—Waiver—Estoppel.

See Insurance, Fire, 4.

14.—Pleading New Matter in Reply—Failure to Demur—Ultra Petita—Issues Joined — Bill of Lading — Transshipment — Original Bills of Lading Continuing—Custom of Trade —Transfer by Indorsement — "The Bank Act."

See Bill of Lading, 2.

15. — Evidence — Judicial Admissions — Nullified Instruments — Cadastre — Plans and Official Books of Reference—Compromise— "Transaction" — Arts. 311 and 1243-1245 C. C.—Arts. 221-225 C. C. P.

See Admissions.

16.—Trustee—Misappropriation — Surety —Knowledge by Cestui que Trust—Parties.

See Evidence, 31.

17.—Title to Land—Entail—Life Estate —Fiduciary Substitution—Privileges and Hypothecs—Mortgage by Institute—Preferred Claim—Prior Incumbrancer—Vis Major—Registry Laws —Practice—Sheriff's Sale—Sheriff's Deed—Chose Jugee—Parties — Deed Poll—Improvements on Substituted Property — Grosses Reparations — Art. 2172 C. C.—29 Vic. c. 26 (Can.).

See Substitution, 2.

EVIDENCE.

1.—Duress—Undue Influence—Valuable Consideration—Action to Set Aside Deed.

An action was brought by an executrix to have a deed set aside and cancelled, on the grounds of undue influence, and incompetence on the part of the grantee. The deed had been executed about two months prior to the will. The executrix alleged that the testator was eighty years of age and of child-like simplicity, that the grantees under the deed had kept him under their control, treated him with violence, and prevented him leaving their house, and that when he had requested the executrix to live with him and take care of him until he died, they would not permit her to do so. The deed purported to have been made in consideration of the grantees paying the testator's debts and maintaining him for the rest of his life.

Held, affirming the decision of the Supreme Court of Nova Scotia, that the evidence showed that the deed had been given for valuable consideration, that there had been no evidence establishing that undue influence had been resorted to in order to obtain it, and that the action to set aside the deed could not be maintained.

Corbett v. *Smith et al.*, 1st May, 1893.

2.—Foundation for Secondary Evidence —Execution of Agreement—Laches—Right to Relief Inconsistent with Claim.

On the hearing of an equity suit secondary evidence of a document was tendered on proof that its proper custodian was out of the jurisdiction and supposed to be in Scotland; that a letter had been written to him asking for it, and to his sister and other persons connected with him inquiring as to his whereabouts, but information was not obtained.

Held, affirming the decision of the Supreme Court of New Brunswick, that this was not a sufficient foundation for secondary evidence; that the letters should have stated that this specific paper was wanted; that an independent person should have been employed to make inquiries in Scotland for the custodian of the document, and to ask for it if he had been found; and that a commission might have been issued to the Court of Session in Scotland, and a commission appointed by that Court to procure the attendance of the custodian and his examination as a witness.

The suit was for a specific performance of an agreement by C., one of the beneficiaries under a will vesting the testator's estate in trustees for division among her children, to sell lands of the estate in New Brunswick to the plaintiff, P.; and the document as to which secondary evidence was offered was an alleged agreement by the trustees and other beneficiaries to convey the said lands to C. The evidence was received, but only established the execution of the alleged agreement by one of the trustees and one of the beneficiaries, and the proof of the contents was not consistent with the documentary evidence, and the case made out by the bill.

Held, that if the evidence was admissible it would not establish the plaintiff's case; that the alleged agreement, not being signed by both the trustees, could convey no estate legal or equitable, to C.; and that the proof of its contents was not satisfactory.

Porter v. *Hale* .. .. xxiii., 265

3.—Action for Personal Injuries Caused by Negligence — Examination of Plaintiff de Bene Esse—Death of Plaintiff—Action by Widow under Lord Campbell's Act—Admissibility of Evidence Taken in First Action—Rights of Third Party.

Though the cause of action given by Lord Campbell's Act for the benefit of the widow and children of a person whose death results from injuries received through negligence is different from that which the deceased had in his lifetime, yet the material issues are substantially the same in both actions, and the widow and children are in effect claiming through the deceased. Therefore, so injured in which his evidence is taken when an action is commenced by a person *de bene esse* and the defendant has a right to cross-examine, such evidence is admissible in a subsequent action taken after his death under the Act. Taschereau and Gwynne, JJ., dissenting,

The admissibility of such evidence as against the original defendants, a municipal corporation sued for injuries caused by falling into an excavation in a public street, is not affected by the fact that they have caused a third party to be added as defendant, as the person who was really responsible for such excavation, and that such third party was not notified of the examination of the plaintiff in the first action, and had no opportunity to cross-examine him. Taschereau and Gwynne, JJ., dissenting.

Town of Walkerton v. *Erdman* .. xxiii., 352

4.—54 & 55 Vic. (Imp.) c. 19, s. 1, s.s. 5—Presence of a British Ship Equipped for Sealing in Behring Sea—Onus Probandi—Lawful Detention.

On 30th August, 1891, the ship "Oscar and Hattie," a fully equipped sealer, was seized in Gotzleb Harbour, in Behring Sea, while taking in a supply of water.

Held, affirming the judgment of the Court below, that when a British ship is found in the prohibited waters of the Behring Sea, the burthen of proof is upon the owner or master to rebut by positive evidence that the vessel is not there used or employed in contravention of the Seal Fishery (Behring's Sea) Act, 1891, 54 & 55 Vic. (Imp.) c. 19, s. 1, s.-s. 5.

Held, also, reversing the judgment of the Court below, that there was positive and clear evidence that the "Oscar and Hattie" was not used or employed at the time of her seizure in contravention of 54 & 55 Vic. c. 19, s. 1, s.-s. 5.

The Ship "Oscar and Hattie" v. *The Queen*, xxiii., 396

5.—Seal Fishery (North Pacific) Act, 1893, 56 & 57 Vic. c. 23 (Imp.) ss. 1, 3 and 4—Judicial Notice of Order in Council Thereunder — Protocol of Examination of Offending Ship by Russian War Vessel, Sufficiency of—Presence within Prohibited Zone—Bona Fides—Statutory Presumption of Liability—Evidence—Question of Fact.

The Admiralty Court is bound to take judicial notice of an Order in Council from which the Court derives its jurisdiction, issued under the authority of the Act of the Imperial Parliament, 56 & 57 Vic. c. 23, The Seal Fishery (North Pacific) Act, 1893.

A Russian cruiser manned by a crew in the pay of the Russian Government, and in command of an officer of the Russian navy is a "war vessel" within the meaning of the said Order in Council, and a protocol of examination of an offending British ship by such cruiser signed by the officer in command is admissible in evidence in proceedings taken in the Admiralty Court in an action for condemnation under the said Seal Fishery (North Pacific) Act, 1893, and is proof of its contents.

The ship in question in this case having been seized within the prohibited waters of the thirty mile zone round the Komandorsky Islands, fully equipped and manned for sealing, not only failed to fulfil the *onus* cast upon her of proving that she was not used

or employed in killing or attempting to kill any seals within the seas specified in the Order in Council, but the evidence was sufficient to prove that she was guilty of an infraction of the statute and Order in Council.

The Ship "Minnie" v. The Queen, xxiii., 478

6.—NEW TRIAL — NEGLIGENCE — QUESTION FOR JURY—WITHDRAWAL OF CASE FROM JURY.

In an action against the defendant for negligence, causing the death of a servant, the Trial Judge withdrew the case from the jury and directed a verdict for the defendant on the ground that there was no evidence of negligence. The Supreme Court of Nova Scotia granted a motion for a new trial with costs, and remitted the cause for further inquiry, and, held, (Graham, J., dissenting), that the Trial Judge erred in withdrawing the case from the jury, as there was evidence of negligence and want of proper and reasonable care, which should have been submitted to the jury. (26 N. S. Rep. 268).

On appeal to the Supreme Court of Canada, it was held, affirming the decision of the Supreme Court of Nova Scotia, *en banc*, that the new trial had been properly ordered.

The New Glasgow Iron, Coal and Railway Co. v. Tobin, 7th November, 1894.

7.—ABSOLUTE TRANSFER — COMMENCEMENT OF PROOF BY WRITING—ORAL EVIDENCE —ARTS. 1233, 1234, C. C.

Verbal evidence is inadmissible to contradict an absolute notarial transfer, even where there is a commencement of proof by writing. (Article 1234 C. C.).

Bury v. Murray .. .. xxiv., 77

8.—PARTNERSHIP — REGISTERED DECLARATION—ART. 1835 C. C.—C. S. L. C. c. 65, s. 1—ORAL EVIDENCE—LIFE POLICY.

An action was brought by W. McL. and F. W. R. to recover amount of an accident policy insuring the members of the firm of McL. Bros. & Co., alleging that J. S. McL., one of the partners, had been accidentally drowned. After the policy was issued the plaintiffs signed and registered a declaration to the effect that the partnership of McL. Bros. & Co. had been dissolved by mutual consent, and they also signed and registered a declaration of a new partnership under the same name, comprising the plaintiffs only. At the trial the plaintiffs tendered oral evidence to prove that these declarations were incorrect, and that J. S. McL. was a member of the partnership at the time of his death.

Held, affirming the judgment of the court below, that such evidence was inadmissible. (Art. 1835 C. C. and chap. 65 C. S. L. C.).

Caldwell v. Accident Ins. Co. of North America .. .. xxiv., 263

9. — PROMISSORY NOTE — CONSIDERATION — ACCOMMODATION — EVIDENCE — NEW TRIAL.

The appeal was from the decision of the Supreme Court of New Brunswick varying the vedict at the trial, pursuant to leave reserved. The appellant brought action against respondent on a number of promissory notes indorsed by the latter and bills accepted by him. The defence was that the bills and notes were accepted and indorsed for the accommodation of the bank, and that defendant had been induced to accept and indorse them by fraud and misrepresentation. It was proved at the trial that Morrison, the agent of the bank, had represented to defendant that the transactions were in the business and for the interest of the bank, which was engaging in matters forbidden by the Bank Act, and had to adopt the course porsued by the agent. The Trial Judge rejected evidence of conversation between a third party, who was on some of the paper in suit, and the agent who succeeded Morrison, as to what had taken place between such third party and Morrison in regard to some of the notes. The ground of his rejection was that the evidence was irrelevant, and that it only arose out of cross-examination. He admitted other objectionable evidence, ruling that only the answer had been objected to. A verdict was given for plaintiff for the amount of one note and of an overdrawn account, and for defendant in respect to all other claims. The Supreme Court of New Brunswick gave the bank judgment for another and a larger note, and defendant judgment for all the rest, including that on which he failed at the trial. Both parties appealed.

The Supreme Court of Canada ordered a new trial on the ground that the evidence rejected at the trial should have been admitted, as it related to a matter relevant to the issue, and that the Trial Judge was wrong in ruling that only the answer to another question was objected to, as there was a general objection to all the evidence at the time.

The Bank of Nova Scotia v. Fish, 6th May, 1895 .. .. xxiv., 709

10.—WILL—ACTION TO ANNUL—TESTAMENTARY INCAPACITY—ONUS OF PROOF.

In an action for the annulment of a will alleged to have been procured at a time when

the testator was not capable of making it, the onus of proving capacity lies upon the party procuring its execution.

Currie v. *Currie*, 6th May, 1895, xxiv., 712

11.—Action—Bar to—Foreign Judgment—Estoppel—Res Judicata—Judgment Obtained After Action Begun—R. S. N. S. (5 ser.) c. 104, s. 12, s.-s. 7; Orders 24 and 70, Rule 2; Order 35, Rule 38.

The provision of R. S. N. S. (5 ser.) c. 104, Order 35, Rule 38, that evidence of a judgment recovered in a foreign country shall not be conclusive, in an action on such judgment in Nova Scotia, of its correctness, but that the defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favour of the defendant in Nova Scotia, who has brought an unsuccessful action in a foreign Court against the plaintiff.

Law et al. v. *Hansen* .. .. .. xxv., 69

12.—Negligence of Servant—Deviation from Employment — Resumption—Contributory Negligence—Infant.

If in a case tried without a jury evidence has been improperly admitted, a Court of Appeal may reject it and maintain the verdict if the remaining evidence warrants it.

Merritt v. *Hepenstal* .. .. .. xxv., 150

13.—Construction of Contract — Inconsistent Conditions—Dismissal of Contractor—Architect's Powers — Arbitrator—Disqualification — Probable Bias — Rejection of Evidence — Judge's Discretion as to Order of Evidence.

A contract for the construction of a public work contained the following clause: "In case the works are not carried on with such expedition and with such materials and workmanship as the architect or clerk of the works may deem proper, the architect shall be at liberty to give the contractors ten days' notice in writing to supply such additional force or material as in the opinion of the said architect is necessary, and if the contractors fail to supply the same it shall then be lawful for the said architect to dismiss the said contractors and to employ other persons to finish the work." The contract also provided that "the general conditions are made part of this contract (except so far as inconsistent herewith), in which case the terms of this contract shall govern." The first clause in the "general conditions" was as follows: "In case the works from the want of sufficient or proper workmen or materials are not proceeding with all the necessary despatch, then the architect may give ten days' notice to do what is necessary, and upon the contractor's failure to do so, the architect shall have the power at his discretion (with the consent in writing of the Court House Committee, or Commission as the case may be), without process or suit at law, to take the work or any part thereof mentioned in such notice out of the hands of the contractor."

Held, Sedgewick and Girouard, JJ., dissenting, that this last clause was inconsistent with the above clause of the contract, and that the latter must govern. The architect therefore had power to dismiss the contractor without the consent in writing of the committee.

At the trial, the plaintiff tendered evidence to show that the architect had acted maliciously in the rejection of materials, but the Trial Judge required proof to be first adduced tending to show that the materials had been wrongfully rejected, reserving until that fact should be established the consideration of the question whether malice was necessary to be proved, and if necessary, what evidence would be sufficient to establish it. Upon this ruling plaintiff declined to offer any further evidence, and thereupon judgment was entered for the defendants.

Held, that this ruling did not constitute a rejection, but was merely a direction as to the marshalling, of evidence within the discretion of the Trial Judge.

Neelon v. *City of Toronto* .. .. xxv., 579

14. — Evidence — Presumptions — Omnia Praesumuntur Contra Spoliatorem.

St. L. filed a petition of right to recover from the Crown the balance alleged to be due on a contract for certain public works. On the hearing it was shown that certain time-books and the original documents from which his accounts had been made up, and also his books of account had disappeared. The Judge of the Exchequer Court found as a fact that these books and documents had been destroyed in view of proceedings before a commission appointed some time prior to the filing of the Petition of Right to inquire into the manner in which the works done under the contract had been carried on, and he dismissed the petition.

Held, reversing the judgment of the Exchequer Court, that the evidence did not warrant the finding that the documents had been destroyed with a fraudulent intent, and

to prevent inquiry; that all that could have been proved by what was destroyed had been supplied by other evidence; and that the rule *omnia præsumuntur contra spoliatorem* did not justify the learned Judge in assuming that if produced the documents destroyed would have falsified St. L.'s accounts, the evidence on the trial showing instead that the accounts would be corroborated.

St. Louis v. *The Queen* .. .. .. xxv., 649

15.—Warranty—Defect in Construction—Satisfaction by Acceptance and User—Variation from Design—Demurrage—Evidence—Onus of Proof—Expert Testimony—Concurrent Findings.

In an action where the defendants counter-claimed damages caused by the defective construction of a boiler for their steamer, which had collapsed:

Held, reversing the decision of the Supreme Court of British Columbia, that conclusive effect should not be given to the evidence of witnesses, called as experts as to the cause of the collapse, who were not present at the time of the accident; whose evidence was not founded upon knowledge, but was mere matter of opinion; who gave no reasons and stated no facts to show upon what their opinion was based, and where the result would be to condemn as defective in design and faulty in construction all boilers built after the same pattern which the evidence showed were in general use.

The judgment therefore allowing the counter-claim was set aside, though against the concurrent findings of two Courts below.

The William Hamilton Manufacturing Co. v. *The Victoria Lumbering and Manufacturing Co.*, xxvi., 96

16.—Rules of Evidence—"The Canada Evidence Act, 1893."

Gambling instruments and certain moneys were seized in a gaming-house under a warrant issued under sec. 575 of the Criminal Code, and confiscated by the judgment of a Police Magistrate sitting in the City of Montreal. An action was brought against the Attorney-General of Canada for the recovery of the money seized and confiscated.

Held, that in an action to revendicate the moneys so seized the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke "The Canada Evidence Act, 1893," so as to be a competent witness in his own behalf.

O'Neil v. *The Attorney-General of Canada*, xxvi., 122

17.—Master and Servant—Negligence—"Quebec Factories Act"—R. S. Q. Arts. 3019-3053—C. C. Art. 1503—Civil Responsibility—Cause of Accident—Conjecture—Evidence—Onus of Proof—Statutable Duty—Police Regulations.

The plaintiff's husband was accidentally killed whilst employed as engineer in charge of defendant's engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial, and left the manner in which the accident occurred a matter to be inferred from the circumstances proved.

Held, that in order to maintain the action it was necessary to prove by direct evidence, or by weighty, concise and consistent presumptions arising from the facts proved that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed.

The provisions of the "Quebec Factories Act" (R. S. Q. arts. 3019 to 3053, inclusively), are intended to operate only as police regulations, and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees, as provided by the Civil Code.

The Montreal Rolling Mills Co. v. *Corcoran*, xxvi., 595

18.—Railway Company—Negligence—Sparks from Engine or "Hot-box"—Damages by Fire—Evidence—Burden of Proof—C. C. Art. 1053—Questions of Fact.

In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the Court appealed from held that there was no sufficient proof that the fire occurred through the fault or negligence of the company, and it was not shown that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding.

Senesac v. *Central Vermont Railway Co.*, xxvi., 641

19.—Parol Testimony—Variation of Written Agreement—New Trial.

The defendant agreed in writing to accept a quantity of goods in payment of two acceptances by the plaintiff. The agreement was carried out by the plaintiff, but he was

subsequently sued by an indorsee of one of the acceptances, and obliged to pay the same. An action was brought by him to recover the amount thus paid from the defendant. At the trial evidence was offered by defendant, and admitted by the Trial Judge, of an oral agreement between him and the plaintiff at the time the written agreement was made, to the effect that the goods were not to be accepted as payment in full of the acceptances but only in part payment thereof. It was held by the Supreme Court of Nova Scotia, that there was error in the admission of such evidence. (28 N. S. Rep. 210).

On appeal to the Supreme Court of Canada, the judgment was affirmed.

Cox v. *Seeley*, 6th May, 1896.

20.—Relevancy—Previous Transaction—Bona Fides—Removal of Suspicions—Inferences Drawn by Jury—Collateral Facts.

It appeared that the defendant for the purpose of supporting his plea of fraud and showing his *bona fides*, had offered in evidence, a transaction between himself and the plaintiff similar to the one in issue, but which had occurred about a year previously, and it had been held in the Supreme Court of New Brunswick, per Hannington, Landry and VanWart, JJ., Tuck, J., dissenting, Baker, J., *dubitante* that such evidence was admissible. as showing grounds for the removal of the defendant's suspicions, and as a fact from which a reasonable inference might be drawn by the jury, bearing upon the question in issue. (33 N. B. Rep. 326).

On appeal to the Supreme Court of Canada, the appeal was dismissed after hearing upon the merits.

The Bank of Nova Scotia v. *Robinson*, 6th June, 1896.

21.—Will—Undue Influence.

In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator, it is not sufficient to show that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shown that they are inconsistent with a contrary hypothesis.

Adams v. *McBeath* .. .. xxvii., 13

22.—To Vary or Explain Deed—Construction of Deed—Title to Lands—Ambiguous Description—Possession—Conduct of Parties—Presumptions from Occupation of Premises—Arts. 1619, 1238, 1242, 1473, 1599, C. C.—47 Vic. c. 87, s. 3 (D.)—48 & 49 Vic. c. 58, s. 3 (D.)—45 Vic. (Q.) c. 20.

By a deed made in August, 1882, the appellant ceded to the Government of Quebec, who subsequently conveyed to the respondent, an immovable described as part of lot No. 1937, in St. Peter's Ward in the City of Quebec, situated between the streets St Paul, St. Roch, Henderson and the river St. Charles, with the wharves and buildings thereon erected. The respondents entered into possession of the lands by virtue of said deeds and remained in possession for twelve years without objection to the boundaries. They then brought an action to have it declared that, by the proper construction of the deeds, an additional strip of land and certain wharves were included and intended to be transferred. They contended that the description in the deed was ambiguous, and that Henderson Street as a boundary should be construed as meaning Henderson Street extended, and they sought to establish their case by the production of certain correspondence which had taken place between the parties prior to the execution of the deed of August, 1882.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, the Chief Justice and King, J., dissenting, that the words "Henderson Street" as used in the deed must be construed in their plain natural sense as meaning the street of that name actually existing on the ground; that the correspondence was not shown to contain all the negotiations or any finally concluded agreement, and could not be used to contradict or modify the deed which should be read as containing the matured conclusion at which the parties had finally arrived; that the deed should be interpreted in the light of the conduct of the parties in taking and remaining so long in possession without objection, which raised against them a strong presumption, not only not rebutted but strengthened by the facts in evidence; and that any doubt or ambiguity in the deed, in the absence of evidence to explain it, should be interpreted against the vendees, and in favour of the vendors.

City of Quebec v. *The North Shore Railway Company* .. .. xxvii., 102

23.—Landlord and Tenant—Loss by Fire—Cause of Fire—Negligence—Civil Responsibility—Legal Presumption—Rebuttal of—Onus of Proof—Hazardous Occupation—Arts. 1053, 1064, 1071, 1626, 1627, 1629 C. C.

To rebut the presumption created by Article 1629 of the Civil Code of Lower Canada

it is not necessary for the lessee to prove the exact or probable origin of the fire, or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (*en bon père de famille*), and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible.

Judgment of the Court of Queen's Bench for Lower Canada affirmed, Strong, C.J., dissenting.

Murphy v. *Labbé* .. .. .. xxvii., 126

24.—Negligence—Defective Machinery—Evidence for Jury.

T. was employed as a weaver in a cotton mill, and was injured while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the head. The mill contained some 400 looms, and for every forty-six there was a man, called the "loom fixer," whose duty it was to keep them in proper repair. The evidence showed that the accident was caused by a bolt breaking by the shuttle coming in contact with it, and as this bolt served as a guard to the shuttle, the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom fixer" was guilty of negligence in not having examined it within reasonable time before it broke. T. obtained a verdict, which was affirmed by the Court of Appeal.

Held, Gwynne, J., dissenting, that the "loom fixer" had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury; and that, as there was evidence to justify the finding, their verdict should stand.

Per Gwynne, J., that the finding of the jury that the negligence consisted in the omission to examine the bolt was not satisfactory, as there was nothing to show that such examination could have prevented the accident, and there should be a new trial.

The Canadian Coloured Cotton Mills Co. v. *Talbot* .. .. xxvii., 198

25. — Election Petition — Preliminary Objections — Service of Petition — Bailiff's Return—Cross-examination —Production of Copy.

A return by a bailiff that he had served an election petition by leaving true copies, "duly certified," with the sitting member is a sufficient return. It need not state by whom the copies were certified. Articles 56 and 78 C. C. P.

Counsel for the person served will not be allowed to cross-examine the bailiff as to the contents of the copies served without producing them or laying a foundation for secondary evidence.

Beauharnois Election Case .. .. xxvii., 232

26. — Evidence — Judicial Admissions — Nullified Instruments — Cadastre — Plans and Official Books of Reference —Compromise—"Transaction" — Estoppel—Arts. 311 and 1243-1245 C. C.—Arts. 221-225 C. C. P.

A will, in favour of the husband of the testatrix, was set aside in an action by the heir-at-law, and declared by the judgment to be *un acte faux*, and therefore to be null and of no effect. In a subsequent petitory action between the same parties:

Held, Girouard, J., dissenting, that the judgment declaring the will *faux* was not evidence of admission of the title of the heir-at-law, by reason of anything the devisee had done in respect of the will, first, because the will having been annulled was for all purposes unavailable, and, secondly, because the declaration of *faux*, contained in the judgment, did not show any such admission.

The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under C. C. P. art. 225, cannot be invoked as a judicial admission, in a subsequent action of a different nature between the same parties.

Statements entered upon cadastral plans and official books of reference made by public officials and filed in the Lands Registration Offices, in virtue of the provisions of the Civil Code of Lower Canada, do not in any way bind persons who were not cognizant thereof, at the time the entries were made.

Where a deed entered into by the parties to a suit in order to effect a compromise of family disputes and prevent litigation, failed to attain its end, and was annulled and set aside by order of the Court as being in contravention of article 211 of the Civil Code of Lower Canada, no allegation contained in it could subsist even as an admission.

Durocher v. *Durocher* .. .. .. xxvii., 363

27. — Will — Sheriff's Deed — Evidence —Proof of Heirship—Rejection of Evidence—New Trial — Champerty—Maintenance.

A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged

heirs-at-law of the testator and through conveyances from them to persons abroad. The Courts below held that the will was valid.

Held, affirming such decision, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay and the best evidence had not been adduced; that as the heirship-at-law was dependent upon the alleged heir having survived his father and it was not established, and the Court would not presume that his father died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust, and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed, and the appeal should be dismissed.

May v. *Logie* .. .. xxvii., 443

28.—Appeal — Evidence by Commission—Reversal on Questions of Fact.

Where the witnesses have not been heard in the presence of the Judge but their depositions were taken before a Commissioner, a Court of Appeal, may deal with the evidence more fully than if the Trial Judge had heard it, or there had been a finding of fact by a jury and may reverse the finding of the Trial Court if such evidence warrants it.

Malzard v. *Hart* .. .. xxvii., 510

29.—Action on Disturbance—Possessory Action—"Possession Annale"—Arts. 946 and 948 C. C. P.—Nature of Possession of Unenclosed Vacant Lands—Boundary Marks — Delivery of Possession.

In 1890, G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person who commenced laying foundations for a building, and in doing so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance.

Held, that the *possession annale*, required by article 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action.

Gauthier v. *Masson* .. .. .. xxvii., 575

30.—Affirmative Testimony—Interested Witnesses—Art. 1232 C. C.—Arts. 251, 252 C. C. P.—Mala Fides—.Common Rumour.

In the estimation of the value of the evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative.

The evidence of witnesses who are near relatives or whose interests are closely identified with those of one of the parties, ought not to prevail in favour of such party against the testimony of strangers who are disinterested witnesses.

Evidence of common rumour is unsatisfactory and should not generally be admitted.

Lefeunteum v. *Beaudoin* .. .. xxviii., 89

31.—Master and Servant—Negligence—Probable Cause of Accident.

Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no direct fault or negligence proved against the defendant, and the actual cause of the accident is purely a matter of speculation or conjecture.

The Canada Paint Co. v. *Trainor*, xxviii., 352

32.—Railways—Eminent Domain—Expropriation of Lands — Arbitration—Evidence—Findings of Fact—Duty of Appellate Court—51 Vic. c. 29 (D.).

On an arbitration in a matter of the expropriation of land under the provisions of "The Railway Act," the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average of the different estimates made on behalf of both parties according to the evidence before them.

Held, reversing the decision of the Court of Queen's Bench and restoring the judgment of the Superior Court (Taschereau and Girouard, JJ., dissenting), that the award was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded.

Grand Trunk Railway Co. of Canada v. *Coupal* .. .. xxviii., 531

33.—Trustee—Misappropriation — Surety —Knowledge by Cestui que Trust—Estoppel—Parties.

Funds held by F. as trustee for C. were misappropriated by being deposited with the firm of F. F. & Co., of which F. was a member, and after being so kept on deposit for a period of upwards of six years, were lost in consequence of the failure of the firm. In an action against the defendants, who were sureties for F., to compel them to make good the funds so misappropriated and lost, the defence relied upon the knowledge of the misappropriation on the part of C., which knowledge was sought to be shown by the fact that payments of interest were made to C. from time to time, by cheque of the insolvent firm.

The Supreme Court of Nova Scotia, *en banc*, held, that the manner in which these payments were made was not evidence of knowledge on the part of C., that she was bound to communicate to the sureties; that at most it showed nothing more than assent by C. to the deposit of the income to which she was entitled, with the firm of which her trustee was a member. The Court also held, that the Trial Judge could have disposed of the contention raised on behalf of the defendants without making C. a party to the suit. And it also seemed to the Court, that knowledge on the part of C. that some part of the trust fund had been placed by the trustee temporarily with F. F. & Co., awaiting investment on good security, would not be held to be knowledge, assent or acquiescence by C., in the misconduct of the trustee which led to the loss of the funds. (30 N. S. Rep. 173, *sub nomine*, *Eastern Trust Co.* v. *Forrest, et al.*)

On appeal the Supreme Court of Canada affirmed the decision of the Supreme Court of Nova Scotia, *en banc*, and dismissed the appeal with costs.

Bayne et al. v. *The Eastern Trusts Co., et al.*, 9th November, 1897 .. .. .. xxviii., 606

34.—Marine Insurance—Partial Loss on Cargo—Stranding—Jury Trial.

On a voyage from Porto Rico to Halifax the "Donzella" put into Barrington, N. S., for shelter, the wind being south-east with a heavy snow storm prevailing. She was anchored near the light ship with one anchor out, but, as the wind increased a second anchor was put out. Subsequently during a heavy gale that sprang up from the north-west, with thick snow, both chains parted. The vessel was then on a lee shore studded with reefs and shoals, and the tide low. She was abandoned by the master and crew, and the following morning was not visible from shore. Some time afterwards she was picked up at sea by salvors, and was brought into port and put upon the slip and repaired. When brought in she had four feet of water in her hold, and her cargo was badly damaged. On being put upon the slip it appeared that twelve feet of the shoe were off abaft the main chains, and another twelve feet, about off, forward under the main chains. The butts on the bottom were open. The keel was more or less chafed and broken. The rudder was damaged and the rudder braces started off. There was a scar on the bilge on the port side which looked as if the vessel had dragged or pounded on something. The sides of the keel were bruised more or less and pieces off of it. The main keel was broomed up. The flying jib-boom and main boom were broken, and the fore boom was split.

The Supreme Court of Nova Scotia, *en banc*, dismissed a motion for a new trial, and held that there, was sufficient evidence to warrant the jury in coming to the conclusion that the vessel had been on shore, and beating on the rocks for some time, and on which they could properly find a verdict for the plaintiff, and that the Trial Judge had acted properly, under the circumstances, in refusing to withdraw the case from the jury.

On appeal to the Supreme Court of Canada, the judgment of the Supreme Court of Nova Scotia was affirmed, and the appeal dismissed with costs.

The British and Foreign Marine Insurance Co. v. *Rudolf*, 14th June, 1898 .. xxviii., 607

34*a*.—Will—Executors and Trustees Under—Dealing with Assets—Lapse of Time — Presumption — Burden of Proof.

See Trust, 1.

34*b*.—Municipal Corporation—Ownership of Streets—Ad Medium Filum Viae—Presumption—Rebuttal.

See Municipal Corporation, 3.

35. — Purchase of Land — Registered Hypothec—Knowledge of — Presumption of Good Faith — Admission — Judicial Avowal—Possession.

See Title to Land, 2.

36.—New Trial—Improper Reception and Rejection of Evidence — Nominal Damages.

See New Trial, 1.

37.—Sale of Goods by Sample—Place of Delivery — Inspection — Mercantile Usage—Contract Made Abroad.

See Contract, 12.

38.—Lease for Lives—Renewal—Insertion of New Life — Evidence of Insertion — Duration of Life—Presumption.

See Lease, 1.

39.—Appreciation of Testimony—Title to Land—Boundaries—Road Allowance.

See Title to Land, 6.

40.—Negligence—Master and Servant—Employer's Liability—Imprudence of Servant — Defective Way—Necessity of Passing over Dangerous Machinery—New Trial.

See Negligence, 16.

41.—Fire Insurance—Contract—Termination—Notice—Waiver—Estoppel.

See Insurance, Fire, 4.

42.—Fraudulent Statement — Proof of Fraud — Presumption—Assignment of Policy—Fraud by Assignor—Reversal on Questions of Fact.

See Insurance, Fire, 5.

43.—Public Work—Wharf Property Injuriously Affected—Damages Peculiar to the Property—Unusual Interference—Eminent Domain.

See Public Work, 2.

44.—Principal and Surety—Giving Time to Principal—Reservation of Rights Against Surety.

See Principal and Surety, 2.

45.—Statute of Frauds—Memorandum in Writing—Repudiating Contract by.

See Contract, 27.

46. — Constitutional Law — Navigable Waters—Title to Bed of Stream—Crown—Dedication of Public Lands — Presumption of Dedication — User —Obstruction to Navigation—Public Nuisance—Balance of Convenience.

See Navigable Waters, 1.

47.—Will—Execution of—Testamentary Capacity.

See Will, 13.

48.—Contact—Sale by Sample — Objections to Invoice—Reasonable Time—Acquiescence—Presumptions.

See Conrtact, 34.

49.—Trustee—Account of Trust Funds—Abandonment by Cestui que Trust.

See Trusts, 7.

50. — Maritime Law — Foreign Vessel Fishing within British Waters of Canada—Three Mile Limit—License—R. S. C. c. 94, s. 3—Onus Probandi.

See Fisheries, 3.

51.— Accident Insurance — Renewal of Policy — Payment of Premium — Agent's Authority—Instructions to Agent—Finding of Jury.

See Insurance, Accident, 1.

52.—Sale—Donation in Form of—Gifts in Contemplation of Death — Mortal Illness of Donor—Presumption of Nullity—Validating Circumstances—Dation en Paiement—Arts. 762, 989, C. C.

See Sale, 9.

53.—Master and Servant—Negligence—Cause of Accident — Contributory Negligence.

See Negligence, 30.

54.—Landlord and Tenant—Loss by Fire —Negligence — Legal Presumption—Rebuttal of—Onus of Proof—Construction of Agreement—Covenant to Return Premises in Good Order—Art. 1629 C. C.

See Landlord and Tenant, 3.

55.—Negligence—Master and Servant—Employer's Liability — Concurrent Findings of Fact — Contributory Negligence.

See Negligence, 35.

56.—Old Trails in Rupert's Land—User—Dedication—Presumption —Necessary Way—Substituted Roadway — Reservation in Crown Grant.

See Highway, 3.

EXCHANGE.

Title to Lands—Ambiguous Description—Possession—Conduct of Parties—Presumptions from Occupation of Premises—Art. 1599 C. C.

See Deed, 6.

EXECUTION.

REAL PROPERTY ACT — REGISTRATION — UNREGISTERED TRANSFERS — EQUITABLE RIGHTS — SALES UNDER EXECUTION—R. S. C. c. 51; 51 VIC. (D.) c. 20.

The provisions of sec. 94 of the Territories Real Property Act (R. S. C. c. 51), as amended by 51 Vic. (D.), c. 29, do not displace the rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens and equities to which the same was subject in the hands of the execution debtor, and do not give the execution creditor any superiority of title over prior unregistered transferees, but merely protect the lands from intermediate sales and dispositions by the execution debtor

If the sheriff sells, however, the purchaser by priority of registration of the sheriff's deed would under the Act take priority over previous unregistered transfers.

Jellett v. *Wilkie*. *Jellett* v. *The Scottish Ontario and Manitoba Land Co*. *Jellett* v. *Powell*. *Jellett* v. *Erratt* .. .. .. xxvi., 282

EXECUTORS.

1.—BUILDING—WANT OF REPAIR—DAMAGES—ART. 1055 C. C.—TRUSTEES—PERSONAL LIABILITY OF—EXECUTORS—ARTS. 921, 981*a* C. C.—PROCEDURE.

The owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect, either in structure, repair, or use, and management, which reasonable care can guard against.

A. T. sued J. F. and M. W. F., personally as well as in their quality of testamentary executors and trustees of the will of the late J. F., claiming $4,000 damages for the death of her husband who was killed by a window falling on him from the third story of a building, which formed part of the general estate of the late J. F., but which had been specifically bequeathed to one G. F., and his children, for whom the said J. F. and M. W. F. were also trustees. The judgment of the courts below held the appellants liable in their capacity of executors of the general estate and trustees under the wills.

Held, that the appellants were responsible for the damages resulting from their negligence in not keeping the building in repair as well personally as in their quality of trustees (*d'héritiers fiduciaires*) for the benefit of G. F.'s children, but were not liable as executors of the general estate.

Where parties are before the court *quâ* executors, and the same parties should also be summoned *quâ* trustees, an amendment to that effect is sufficient, and a new writ of summons is not necessary.

Ferrier v. *Trépannier* .. .. .. xxiv., 87

2.—TESTAMENTARY SUCCESSION—EXECUTORS—BALANCE DUE BY TUTOR—PRACTICE—ACTION FOR ACCOUNT — PROVISIONAL POSSESSION—ENVOIE EN POSSESSION—PARTIES.

The appeal was from the judgment of the Court of Queen's Bench for Lower Canada (Q. R. 6 Q. B. 34), which reversed the decision of the Superior Court, District of Quebec, and dismissed the plaintiff's action and incidental demand, and held, that on failure of testamentary executors to render an account, the heirs of the testator have no direct action against them for alleged balances in their hands; that their proper recourse would be by an action for account, which should embrace the whole of the administration of the succession by the executors, and could not be restricted to particular or isolated matters; that a demand for provisional possession (*envoie en possesion*), of a testamentary succession against an executor who has had the administration thereof should implead all the heirs as plaintiffs, and that failure in the joinder of any one of them would be fatal, and the defendant could not be compelled to call them in as parties to the action, and further, that, in a case where there were several executors, such actions must be brought against them jointly, and could not be validly instituted against one of them even with the extra-judicial consent of the others.

The Supreme Court of Canada affirmed the decision of the Court of Queen's Bench, and dismissed the appeal with costs.

Cream et al. v. *Davidson*, 1st May, 1897. xxvii., 362

3.—REMOVAL OF EXECUTORS BY CODICIL—REFERENCE TO REVOKED WILL—INTENTION TO REVIVE.

See Will, 3.

4.—TRUSTEE — ACCOUNTS — JURISDICTION OF PROBATE COURT—RES JUDICATA.

See Trusts, 3.

5.—TRUSTEES AND EXECUTORS—LEGACY IN TRUST — DISCRETION OF TRUSTEE — VAGUENESS OR UNCERTAINTY AS TO BENEFICIARIES — POOR RELATIVES — PUBLIC PROTESTANT CHARITIES — CHARITABLE USES — PERSONA DESIGNATA.

See Will, 8.

6.—Nova Scotia Probate Act—R. S. N. S. (5 ser.) c. 100 and 51 Vic. (N. S.) c. 26—License to Sell Lands—Estoppel—Res Judicata.

See Res Judicata, 8

EXEMPTIONS.

Real Property — Chattels — Fixtures—Gas Pipes — Highway — Legislative Grant of Soil—11 Vic. c. 14 (Can.)—53 Vic. c. 48 (O.)—"Ontario Assessment Act, 1892."

See Assessment, 7.

EX POST FACTO LEGISLATION.

Special Taxes — Warranty — Montreal Local Improvements.

See Municipal Corporation, 23.

EXPRESS COMPANY.

Bailees—Common Carriers—Receipt for Money Parcel—Conditions Precedent—Formal Notice of Claim—Pleading—Money Had and Received—Special Pleas.

See Action, 5.

EXPROPRIATION.

1.—Railway Expropriation—Award—Additional Interest—Confirmation of Title—Diligence—The Railway Act, 1888, ss. 162, 170, 172.

On a petition to the Superior Court, praying that a railway company be ordered to pay into the hands of the Prothonotary of the Superior Court a sum equivalent to six per cent. on the amount of an award previously deposited in Court under sec. 170 of the Railway Act, and praying further that the company should be enjoined and ordered to proceed to confirmation of title, with a view to the distribution of the money, the company pleaded that the company had no power to grant such an order, and that the delays in proceeding to confirmation of title had been caused by the petitioner, who had unsuccessfully appealed to the higher Courts for an increased amount.

Held, reversing the judgment of the Court below, that by the terms of sec. 172 of the Railway Act it is only by the judgment of confirmation that the question of additional interest can be adjudicated upon.

Held, further, that assuming the Court had jurisdiction, until a final determination of the controversy as to the amount to be distributed, the railway company could not be said to be guilty of negligence in not obtaining a judgment in confirmation of title. (Railway Act, s. 172). Fournier, J., dissenting.

The Atlantic & North-west Railway Co. v. *Judah* .. .. xxiii., 231

2.—Petition of Right—Public Work—Injury to Property—Obstruction of Canal—Use of Canal.

The appellant, claiming to be owner of the Shubenacadie Canal in Nova Scotia, brought suit by petition of right to recover damages from the Crown for expropriating part of his property in construction of public works and for obstructing the use of the canal. The Exchequer Court (4 Ex. C. R. 130), without deciding as to the title of appellant, which was disputed, held that expropriation had not been proved, and refused damages for obstruction on the ground that the canal was not open for traffic. The judgment included a declaration that appellant was entitled, whenever it should be so opened and the traffic obstructed by the public work, to have the obstruction removed.

The Supreme Court of Canada affirmed the judgment of the Exchequer Court, and dismissed the appeal with costs.

Fairbanks v. *The Queen*, 6th May, 1895, xxiv., 711

3.—Arbitration — Award by Majority — Interference with on Appeal.

See Arbitration, 2.

4.—Assessments — Local Improvements — Future Rights—Jurisdiction.

See Appeal, 51.

And *see* Eminent Domain.

FAITS ET ARTICLES.

See Interrogatories.

FALSE BIDDING, RESALE FOR.

Sale by Sheriff—Folle Enchere—Resale for False Bidding—Art. 690 *et seq.* C. C. P.—Questions of Practice—Appeal—Art. 688 C. C. P.—Privileges and Hypothecs — Sheriff's Deed — Registration of—Absolute Nullity—Rectification of Slight Errors in Judgment—Duty of Appellate Court.

See Appeal, 56.

FERRIES.

CONSTITUTIONAL LAW—MUNICIPAL CORPORATION — POWERS OF LEGISLATURE — LICENSE — MONOPOLY — HIGHWAYS AND FERRIES — NAVIGABLE STREAMS — BY-LAWS AND RESOLUTIONS — INTERMUNICIPAL FERRY—TOLLS—DISTURBANCE OF LICENSEE — NORTH-WEST TERRITORIES ACT, R. S. C. c. 50, ss. 13 AND 24—B. N. A. ACT (1867) s. 92, ss. 8, 10 AND 16—REV. ORD. N. W. TER. (1888) c. 28—ORD. N. W. T. No. 7 OF 1891-92, s. 4—COMPANIES, CLUB ASSOCIATIONS AND PARTNERSHIPS.

See Constitutional Law, 14.

FINAL JUDGMENT.

1.—CONTEMPT OF COURT—PROCEEDINGS BY ATTACHMENT—SENTENCE.

See Appeal, 4.

2.—NEW TRIAL—APPEAL FROM ORDER FOR—FINAL JUDGMENT.

See Appeal, 7.

3. — SCHOOL CORPORATION — DECISION OF SUPERINTENDENT OF PUBLIC INSTRUCTION — APPEAL — FINAL JUDGMENT — MANDAMUS—PRACTICE.

See Mandamus, 1.

FIRE INSURANCE.

See Insurance, Fire.

FIXTURES.

1.—MORTGAGE—MINING MACHINERY—REGISTRATION — INTERPRETATION OF TERMS — BILL OF SALE—PERSONAL CHATTELS—DELIVERY—R. S. N. S. (5 SER.) c. 92, ss. 1, 4 AND 10 (BILLS OF SALE)—55 VIC. (N. S.) c. 1, s. 143, (THE MINES ACT)—41 & 42 VIC. (N. S.) c. 31, s. 4.

See Mortgage, 7.

2.—PROPERTY REAL AND PERSONAL—IMMOVABLES BY DESTINATION—MOVABLES INCORPORATED WITH THE FREEHOLD —SEVERANCE FROM REALTY—CONTRACT RESOLUTORY CONDITION — CONDITIONAL SALE—ARTS. 379, 2017, 2083, 2085, 2089, C. C.—HYPOTHECARY CREDITOR—UNPAID VENDOR.

See Contract, 30.

And *see* Immovable Property.

FISHERIES.

1.—MARITIME LAW—FOREIGN VESSEL WITHIN BRITISH WATERS—FISHING WITHIN THREE MILE LIMIT — LICENSE —FORFEITURE—R. S. C. c. 94, s. 3—EVIDENCE —ONUS PROBANDI.

The third section of the "Act respecting Fishing by Foreign Vessels" (R. S. C. c. 94), prohibits fishing by foreign vessels in British waters within three marine miles of the coasts of Canada, without a license from the Governor in Council, on pain of forfeiture. In an action *in rem* in the Nova Scotia Admiralty District, the Local Judge (McDonald, C.J.), of the Exchequer Court of Canada, Admiralty Side, adjudged the condemnation and forfeiture of the vessel in question, her furniture and cargo, with costs (4 Ex. C. R. 419), and held, that where the Crown alleged in the petition in an action *in rem* for condemnation and forfeiture, that a certain vessel had violated the provisions of the above mentioned Act by fishing in prohibited waters without the necessary license, but offered no evidence in support of such allegation, the burden of proving the license to fish was upon the defendant.

On appeal to the Supreme Court of Canada, the decision of the Exchequer Court was affirmed and the appeal dismissed with costs.

The "Henry L. Phillips" v. *The Queen*, 18th February, 1895 .. .. xxv., 691

2.—CANADIAN WATERS—PROPERTY IN BEDS — PUBLIC HARBOURS — ERECTIONS IN NAVIGABLE WATERS — INTERFERENCE WITH NAVIGATION—RIGHT OF FISHING—POWER TO GRANT — RIPARIAN PROPRIETORS—GREAT LAKES AND NAVIGABLE RIVERS—OPERATION OF MAGNA CHARTA—PROVINCIAL LEGISLATION — R. S. O. (1887) c. 24, s. 47—55 VIC. c. 10, ss. 5 TO 13, 19 AND 21 (O.)—R. S. Q. ARTS. 1375 TO 1378.

Riparian proprietors before Confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. *Robertson* v. *The Queen* (6 Can. S. C. R. 52) followed.

The rule that riparian proprietors own *ad medium filum aquæ* does not apply to the great lakes or navigable rivers.

Where beds of such waters have not been granted the right of fishing is public and not restricted to waters within the ebb and flow of the tide.

Where the provisions of Magna Charta are not in force, as in the Province of Quebec, the Crown, in right of the province, may grant exclusive rights of fishing in tidal waters, except in tidal public harbours in which as in public harbours, the Crown in right of the Dominion may grant the beds and fishing rights. Gwynne, J., dissenting.

Per Strong, C.J., and King and Girouard, JJ.—The provisions of Magna Charta relating to tidal waters would be in force in the provinces in which such waters exist (except Quebec), unless repealed by legislation, but such legislation has probably been passed by the various Provincial Legislatures; and these provisions of the Charter so far as they affect public harbours have been repealed by Dominion legislation.

The Dominion Parliament cannot authorize the giving by lease, license or otherwise the right of fishing in non-navigable waters, nor in navigable waters, the beds and banks of which are assigned to the provinces under the British North America Act. The legislative authority of Parliament under section 91, item 12, is confined to the regulation and conservation of sea-coast and inland fisheries under which it may require that no person shall fish in public waters without a license from the Department of Marine and Fisheries, may impose fees for such license and prohibit all fishing without it, and may prohibit particular classes, such as foreigners, unconditionally from fishing. The license as required will, however, be merely personal conferring qualifications, and give no exclusive right to fish in a particular locality.

Section 4 and other portions of c. 95, Revised Statutes of Canada, so far as they attempt to confer exclusive right of fishing in provincial waters, are *ultra vires*. Gwynne, J., contra.

Per Gwynne, J.—Provincial Legislatures have no jurisdiction to deal with fisheries. Whatever comes within the that term is given to the Dominion by the British North America Act, section 91, item 12, including the grant of leases or licenses for exclusive fishing.

Per Strong, C.J., Taschereau, King and Girouard, JJ.—R. S. O. c. 24, s. 47, and ss. 5 to 13 inclusive of the Ontario Act of 1892, are *intra vires*, but may be superseded by Dominion legislation.—R. S. Q. arts. 1375 to 1378 inclusive, are *intra vires*.

Per Gwynne, J.—R. S. O. c. 24, s. 47 is *ultra vires* so far as it assumes to authorize the land covered with water within public harbours.

The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government, for protection against interference with navigation. The Act of 1892, and R. S. Q. arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are *ultra vires*.

In re Jurisdiction over Provincial Fisheries xxvi., 441

3.—Constitutional Law—Convention of 1818 — Construction of Treaty—Construction of Statute — Three-mile Limit—Foreign Fishing Vessels —"Fishing"—59 Geo. III., c. 38 (Imp.) —R. S. C. cc. 94 & 95.

Where fish had been enclosed in a seine more than three marine miles from the coast of Nova Scotia, and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew then being engaged in the act of bailing the fish out of the seine:

Held, Strong, C.J., and Gwynne, J., dissenting, affirming the decision of the court below, that the vessel when so seized was "fishing in violation of the convention of 1818 between Great Britain and the United States of America, and of the Imperial Act, 59 Geo. III., c. 38, and the Revised Statutes of Canada, c. 94, and consequently liable with her cargo, tackle, rigging, apparel, furniture and stores to be condemned and forfeited.

The Ship "Frederick Gerring, Jr." v. The Queen .. .. xxvii., 271

FOLLE ENCHERE.

See False Bidding.

FOREIGN JUDGMENT.

Action—Bar to—Estoppel—Res Judicata —Judgment Obtained After Action Begun—R. S. N. S. (5 ser.) c. 104, s. 12, s.-s. 7; Orders 24 and 70; Rule 2; Order 35, Rule 38.

A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada.

Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. *The Delta* (1 P. D. 393), distinguished.

The combined effect of orders 24 and 70 rule 2, and s. 12, s.-s. 7 of c. 104 R. S. N. S. (5 ser.), will permit this to be done in Nova Scotia.

The provision of R. S. N. S. (5 ser.), c. 104) Order 35, Rule 38, that evidence of a judgment recovered in a foreign country shall not, in an action on such judgment in Nova Scotia, be conclusive, of its correctness, but that the defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favour of the defendant in Nova Scotia who has brought an unsuccessful action in a foreign court against the plaintiff

Law et al. v. *Hansen* .. .. .. xxv., 69

FORESHORE.

44 Vic. c. 1, s. 18—Powers of Canadian Pacific Railway Company to take and Use Foreshore—49 Vic. c. 32 (B. C.)—City of Vancouver—Right to Extend Streets to Deep Water—Crossing of Railway—Jus Publicum—Implied Extinction by Statute—Injunction.

By 44 Vic. c. 1, s. 18, the Canadian Pacific Railway Company "have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea in so far as the same shall be vested in the Crown, and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways." By 50 & 51 Vic. c. 56, s. 5, the location of the company's line of railway between Port Moody and the City of Westminster, including the foreclosure of Burrard Inlet at the foot of Gore Avenue, Vancouver City, was ratified and confirmed. The Act of Incorporation of the City of Vancouver, 49 Vic. c. 82, s. 213 (B. C.), vests in the city all streets, highways, etc., and in 1892 the city began the construction of works extending from the foot of Gore Avenue, with the avowed object to cross the railroad track at a level, and obtain access to the harbour at deep water.

On an application by the railway company for an injunction to restrain the City Corporation from proceeding with their work of construction and crossing the railway:

Held, affirming the judgment of the court below that as the foreshore forms part of the land required by the railway company, as shown on the plan deposited in the office of the Minister of Railways, the *jus publicum* to get access to and from the water at the foot of Gore Avenue is subordinate to the rights given to the railway company by the statute (44 Vic. c. 1, s. 18 *a*), on the said foreshore, and therefore the injunction was properly granted.

City of Vancouver v. *Canadian Pacific Railway Co.* .. .. xxiii., 1

FORFEITURE.

Mines and Minerals—Lease of Mining Areas—Rental Agreement—Payment of Rent—R. S. N. S. (5 ser.) c. 7—52 Vic. c. 23 (N. S.—Construction of Statute.

See Lease, 2.

FRAUD.

1.—Preferences — Badge of Fraud — Authority.

In an assignment for benefit of creditors authority to the assignee not only to prefer parties to accommodation paper but also to pay all "costs, charges and expenses to arise in consequence" of such paper is a badge of fraud.

Kirk v. *Chisholm* .. .. xxvi., 111

2.—Partnership — Simulated Dissolution —Fraud—Husband and Wife—Benefit Conferred During Marriage.

See Partnership, 1.

3.—Sale of Goods by Insolvent—Bona Fides.

See Insolvency, 1.

4.—Fraudulent Statement — Proof of Fraud—Presumption — Assignment of Policy—Fraud by Assignor—Reversal on Question of Fact.

See Appeal, 37.

" Insurance, Fire, 5.

5. — Trustees and Administrators — Fraudulent Conversion — Past Due Bonds — Negotiable Security — Commercial Paper—Debentures Transferable by Delivery — Equity of Previous Holders — Estoppel — Brokers and Factors — Pledge—Implied Notice—Innocent Holders for Value—Principal and Agent.

See Pledge, 1.

6.—Debtor and Creditor — Composition and Discharge — Acquiescence in — New Arrangement of Terms of Settlement—Waiver of Time Clause —Principal and Agent—Deed of Discharge—Notice of Withdrawal from Agreement — Fraudulent Preferences.

See Debtor and Creditor, 8.

7.—Conveyance of Land in Name of Trustee — Debtor and Creditor — Parties in Pari Delicto.

See Trusts, 9.

FRAUDS, STATUTE OF.

Memorandum in Writing — Repudiating Contract by.

A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo. under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale.

Martin v. *Haubner* .. .. .. xxvi., 142

And *see* Statute of Frauds.

FRAUDULENT CONVEYANCES.

Estoppel — Conveyance by Married Woman—Agreement—Recital — Bona Fides.

B., a married woman, in order to carry out an agreement between her husband and his creditors consented to convey to the creditor a farm, her separate property, in consideration of the transfer by her husband to her of the stock and other personal property on, and of indemnity against her personal liability on a mortgage against, said farm. The conveyance, agreement and bill of sale of the chattels were all executed on the same day, the agreement, to which B. was not a party, containing a recital that the husband was owner of the said chattels but giving the creditor no security upon them. The chattels having subsequently been seized under execution against the husband it was claimed, on interpleader proceedings, that the bill of sale was in fraud of the creditor.

Held, affirming the decision of the Court of Appeal, that the recital in the agreement worked no estoppel as against B.; that as it appeared that the husband expressly refused to assign the chattels to his creditor there was nothing to prevent him from transferring them to his wife, and that the Court of Appeal rightly held the transaction an honest one, and B. entitled to the goods and to indemnity against the mortgage.

Boulton et al. v. *Boulton* .. .. xxviii., 592

FRAUDULENT PREFERENCES.

1.—Sheriff—Trespass—Sale of Goods by Insolvent—Bona Fides—Judgment of Inferior Tribunal—Estoppel—Bar to Action—Res Judicata—Pleading.

K. was a trader, and in insolvent circumstances when he sold the whole of his stock in trade to D. At the time of this sale D. was aware that two of D.'s creditors had recovered judgments against him. The sheriff afterwards seized the goods so sold, under executions issued upon judgments subsequently obtained, and upon an interpleader issue tried in the County Court the jury found that K. had sold the goods with intent to prefer the creditors who held the prior judgments, but that D. had purchased in good faith and without knowing of such intention on the part of the vendor. Judgment was thereupon entered against D. in the County Court, and the judgment was affirmed by the Supreme Court of British Columbia *en banc*.

In an action afterwards brought by D. against the sheriff for trespass in seizing the goods he obtained a verdict, which was, however, set aside by the court *en banc*, a majority of the Judges holding that the County Court judgment was a complete bar to the action.

On appeal to the Supreme Court of Canada;

Held, reversing the judgment of the Supreme Court of British Columbia, that as the evidence showed that the goods had been purchased in good faith by D. for his own benefit, the sale was not void under the statute respecting fraudulent preferences; that the County Court judgment, being a decision of an inferior tribunal of limited jurisdiction, could not operate as a bar in respect of a cause of action in the Supreme Court, beyond the jurisdiction of the County Court, and further, that even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel, by a plea setting up in detail all the facts necessary to constitute the estoppel, and that from the evidence in the case it appeared that no such estoppel could have been established. Taschereau, J., dissented.

Davies v. *McMillan*, 1st May, 1893.

2.—Assignment for Benefit of Creditors —Preferences—R. S. N. S. c. 92, ss. 4, 5, 10—Chattel Mortgage—Statute of Eliz.

An assignment is void under the Statute of Elizabeth as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member and provides for allowance of interest on the claim of the said firm until paid, and the assignee is permitted to continue in the same possession and control of business as he

previously had, though no one of these provisions taken by itself would have such effect.

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

Kirk v. *Chisholm* .. .. xxvi., 111

3.—Insolvency—Pressure—Assignment of Expected Profits—Statute of Elizabeth—Assets Exigible in Execution.

The appeal was from the judgment of the Court of Appeal for Ontario, affirming the judgment of Street, J., in the High Court of Justice, which dismissed the action of the plaintiff with costs. The action was brought to set aside an assignment, by way of security, to the defendant of an interest in the profits expected to be earned under a contract for the performance of work, on the ground that it was made to defeat, hinder, defraud, delay and prejudice the creditors of the assignor, (who was insolvent), and to give the assignee an unjust preference. In the trial court the decision in favour of the defendant was based on the ground that the assignment had been made under pressure, and was therefore valid. The Court of Appeal affirmed this judgment, but upon other grounds, holding that as the subject of the assignment did not consist of assets which could be reached by creditors at the time when it was made, the assignment did not come within the Act respecting Assignments and Preferences (24 Ont. App. R. 153).

The Supreme Court of Canada dismissed the appeal with costs, adopting the reasoning of the Judges in the Court of Appeal for Ontario.

Blakely et al. v. *Gould*, 10th Nov., 1897, xxvii., 682

4.—Insolvency—Assignment— Preference — Payment in Money — Cheque of Third Party—R. S. O. c. 124, s. 3.

In an appeal from a judgment of the Court of Appeal for Ontario (23 Ont. App. R. 439), which held that indorsing and giving a creditor the unaccepted cheque of a third person in the debtor's favour is not a payment of money to the creditor within the meaning of the third section of chapter 124 of the Revised Statutes of Ontario (1887), and overruling *Armstrong* v. *Hemstreet* (22 O. R. 366),

The Supreme Court of Canada affirmed the decision of the Court of Appeal and dismissed the appeal with costs.

Fraser et al. v. *Davidson & Hay*, 1st May, 1897 .. .. xxviii., 272

5.—Debtor and Creditor — Insolvency — Fraudulent Preferences — Chattel Mortgage — Advances of Money — Solicitor's Knowledge of Circumstances—R. S. O. (1887) c. 124—54 Vic. c. 20 (Ont.)—58 Vic. c. 23 (Ont.).

In order to give a preference to a particular creditor, a debtor who was in insolvent circumstances, executed a chattel mortgage upon his stock in trade in favour of a moneylender by whom a loan was advanced. The money, which was in the hands of the mortgagee's solicitor, who also acted for the preferred creditor throughout the transaction, was at once paid over to the creditor who, at the same time, delivered to the solicitor, to be held by him as an escrow and dealt with as circumstances might require, a bond indemnifying the mortgagee against any loss under the chattel mortgage. The mortgagee had previously been consulted by the solicitor as to the loan, but was not informed that the transaction was being made in this manner to avoid the appearance of violating the acts respecting Assignments and Preferences and to bring the case within the ruling in *Gibbons* v. *Wilson* (17 Ont. App. R. 1).

Held, that all the circumstances, necessarily known to his solicitor in the transaction of the business, must be assumed to have been known to the mortgagee, and the whole affair considered as one transaction contrived to evade the consequences of illegally preferring a particular creditor over others, and that, under the circumstances, the advance made was not a *bonâ fide* payment of money within the meaning of the statutory exceptions.

Burns & Lewis v. *Wilson* .. .. xxviii., 207

6.—Assignment for Benefit of Creditors —Preferred Creditors—Money Paid under Voidable Assignment — Levy and Sale under Execution—Statute of Elizabeth.

Where an assignment has been held void as against the statute, 13 Eliz., c. 5, and the result of such decision is that a creditor who had subsequently obtained judgment against the assignor and, notwithstanding the assignment, sold all the debtor's personal property so transferred, becomes entitled to all the personal property of the assignor

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

Cummings & Sons v. *Taylor et al.*, xxviii., 337

7.—Debtor and Creditor—Transfer of Property—Delaying or Defeating Creditors—13 Eliz. c. 5.

A transfer of property to a creditor for valuable consideration, even with intent to prevent it being seized under execution at the suit of another creditor, and to delay the latter in his remedies or defeat them altogether, is not void under 13 Eliz., c. 5, if the transfer is made to secure an existing debt, and the transferree does not, either directly or indirectly, make himself an instrument for the purpose of subsequently benefiting the transferror.

Mulcahy v. *Archibald* .. .. xxviii., 523

8.—Insolvency—Transfer of Insolvent's Property to Creditor—Knowledge of Creditor—Arts. 1035, 1036, 1169, C. C.

See Debtor and Creditor, 4.

9.—Assignment for the Benefit of Creditors — Preferred Creditors — Money Paid under Voidable Assignment—Liability of Assignee—Statute of Elizabeth—Hindering and Delaying Creditors.

See Assignment, 3.

FUTURE RIGHTS.

1.—Appeal — Expropriation of Lands—Assessments—Local Improvements—R. S. C. c. 135, s. 29 (*b*)—56 Vic. c. 29, s. 1 (D.).

See Appeal, 51.

2.—Action en Bornage—Title to Lands—R. S. C. c. 135, s. 29 (*b*)—54 & 55 Vic. c. 25, s. 3 (D.)—56 Vic. c. 29, s. (D.).

See Appeal, 53.

3.—Appeal — Jurisdiction — Appealable Amount—Future Rights—Alimentary Allowance — "Other Matters and Things"—R. S. C. c. 135, s. 29 (*b*)—56 Vic. (D.) c. 29.

See Appeal, 58.

GAME LAWS.

Province of Quebec—Game Killed Out of Season—Seizure of Furs—Search Warrant—Justice of the Peace—Jurisdiction—Writ of Prohibition—R. S. Q. Arts. 1405, 1409.

See Practice, 11.

" Prohibition, 1.

GAMING.

Criminal Code, s. 575—Persona Designata—Officers de Facto and de Jure—Chief Constable—Common Gaming House—Confiscation of Gaming Instruments, Moneys, Etc.—Evidence—The Canada Evidence Act, 1893, ss. 2, 3, 20 and 21.

Section 575 of the Criminal Code, authorizing the issue of a warrant to seize gaming implements on the report of "the chief constable or deputy chief constable" of a city or town, does not mean that the report must come from an officer having the exact title mentioned, but only from one exercising such functions and duties as will bring him within the designation used in the statute. Therefore, the warrant could properly issue on the report of the deputy high constable of the City of Montreal. Girouard, J., dissenting.

The warrant would be good if issued on the report of a person who filled *de facto* the office of deputy high constable though he was not such *de jure*.

In an action to revendicate the moneys so seized the rules of evidence in civil matters prevailing in the province would apply, and the plaintiff could not invoke "The Canada Evidence Act, 1893," so as to be a competent witness in his own behalf in the Province of Quebec.

Per Strong, C.J.—A judgment declaring the forfeiture of money so seized cannot be collaterally impeached in an action of revendication.

O'Neil v. *Attorney-General of Canada*, xxvi., 122

GARNISHEE.

Husband and Wife—Purchase of Land by Wife—Re-sale—Garnishee of Purchase Money on—Debt of Husband—Statute of Elizabeth—Hindering or Delaying Creditors.

See Practice, 19.

GAS COMPANY.

CONSTRUCTION OF CONTRACT—CONSTRUCTION OF STATUTE—12 VIC. C. 183, S. 20—NOTICE TO CANCEL CONTRACT—GAS SUPPLY SHUT OFF FOR NON-PAYMENT OF GAS BILL ON OTHER PREMISES—MANDAMUS.

An agreement to furnish gas contained an express provision that either of the contracting parties should have the right to cancel the contract by giving twenty-four hours notice in writing. Notices were sent in writing to the consumer that his gas would be shut off, at a certain number on a street named, unless he paid arrears of gas bills due upon another property.

Held, that such notices could not be considered as notices given under the contract for the purpose of cancelling it.

The Act to amend the Act incorporating the New City Gas Company of Montreal, and to extend its powers (12 Vic. c. 182), provides:—"That if any person or persons, company or companies, or body corporate supplied with gas by the company, should neglect to pay any rate, rent or charge due to the said New City Gas Company, at any of the times fixed for the payment thereof, it shall be lawful for the company or any person acting under their authority, on giving twenty-four hours previous notice, to stop the gas from entering the premises, service pipes, or lamps of any such person, company or body, by cutting off the service pipe or pipes, or by such other means as the said company shall see fit, and to recover the said rent or charge due up to such time, together with the expenses of cutting off the gas, in any competent court, notwithstanding any contract to furnish for a longer time, and in all cases where it shall be lawful for the said company to cut off and take away the supply of gas from any house, building or premises, under the provisions of this Act, it shall be lawful for the company, their agents and workmen, upon giving twenty-four hours previous notice to the occupier or person in charge, to enter into any such house, building or premises, between the hours of nine o'clock in the forenoon and four in the afternoon, making as little disturbance and inconvenience as possible, and to remove, take and carry away any pipe, meter, cock, branch, lamp, fittings or apparatus, the property of and belonging to the said company."

Held, Taschereau, J., dissenting, that the powers given by the clause quoted are exorbitant and must be construed strictly; that the company has not been thereby vested with power to shut off gas from the buildings and premises of the same proprietor or occupant, when he becomes in default for the payment of bills for gas consumed in one of them only; and that the provision that the notice to cut off must be given "to the occupier or person in charge," indicates that only premises so occupied and in default should suffer.

Cadieux v. *The Montreal Gas Company*, xxviii., 382

(The Judicial Committee of the Privy Council granted leave to appeal from this judgment; 1898 A. C. 718).

GUARANTEE.

1.—CONSTRUCTION OF AGREEMENT—GUARANTEE.

A., a wholesale merchant, had been supplying goods to C. & Co. when, becoming doubtful as to their credit, he insisted on their account being reduced to $5,000, and security for further credit. W., who had indorsed to secure a part of the existing debt, thereupon gave A. a guarantee in the form of a letter, as follows:—"I understand that you are prepared to furnish C. & Co. with stock to the extent of $5,000 as a current account, but want a guarantee for any amount beyond that sum. In order not to impede their operations I have consented to become responsible to you for any loss you may sustain in any amount upon your current account in excess of the said sum of five thousand, but the total amount not to exceed eight thousand dollars including your own credit of five thousand, unless sanctioned by a further guarantee." * * * A. then continued to supply C. & Co., with goods, and in an action by him on this guarantee:

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that there could be no liability on this guarantee unless the indebtedness of C. & Co. to A. should exceed the sum of $5,000, and at the time of action brought such indebtedness, having been reduced by payments from C. & Co. and dividends from their insolvent estate to less than such sum, A. had no cause of action.

Alexander v. *Watson* .. .. .. xxiii., 670

2.—PATENT OF INVENTION—BUSINESS AGREEMENT TO MANUFACTURE UNDER—LETTER OF GUARANTEE—FAILURE OF SCHEME—LIABILITY OF GUARANTOR.

The chief object of an agreement between A. and B. was the profitable manufacture

and sale of wares under a patent of invention issued to A., and in consideration of advances by B. to an amount not exceeding $6,000, C. by a letter of guarantee agreed "to become a surety to B. for the repayment of the $6,000 within 12 months from the date of the agreement if it should transpire that, for the reasons incorporated in said agreement, it should not be carried out."

On an action brought by B. against C. for $6,000 it was proved at the trial that the manufacturing scheme broke down through defects of the invention.

Held, affirming the judgment of the court below, that C. was liable for the amount guaranteed by his letter.

Angus v. *Union Gas and Oil Stove Co.*, xxiv., 104

3.—Principal and Surety — Guarantee Bond—Default of Principal—Non-disclosure by Creditor.

W. was appointed agent of a company in 1891 to sell its goods on commission, and gave a bond with sureties for faithful discharge of his duties. His appointment was renewed year after year, a new bond with the same sureties being given to the company on each renewal. His agreement with the company only authorized W. to sell for cash, but at the end of each season he was in arrear in his remittances, which he attributed to slow collections, and which he settled by giving an indorsed note, retiring the same before the bond for the next year was executed. After the season of 1894 the company discovered that W. had collected moneys of which he had made no return and brought an action to recover the same from the sureties.

Held, reversing the decision of the Court of Appeal, that each year there was an employment of W. distinct from, and independent of, those of preceding years; that the position of the sureties on re-appointment was the same as if other persons had signed the bond of the preceding year; and that the company was under no obligation, on taking a new bond, to inform the sureties that W. had not punctually performed his undertakings in respect of previous employment, nor did the non-disclosure imply a representation to the sureties when they signed a new bond that they had been punctually performed.

Niagara District Fruit Growers' Stock Co. v. *Walker et al.* .. .. xxvi., 629

4.—Guarantee of Honesty of Employee—Guarantee Policy—Notice of Defalcation.

See Surety, 3.

5.—Insolvency—Assignment for Benefit of Creditors—Sale of Assets to Wife of Insolvent—Guarantee by Creditor and Inspector—Trustee—Action for Account of Profits.

See Insolvency, 2.

HABEAS CORPUS.

1.—Jurisdiction—Form of Commitment—Territorial Division—Judicial Notice—R. S. C. c. 135, s. 32.

A warrant of commitment was made by the stipendiary magistrate for the police division of the Muncipality of the County of Pictou, in Nova Scotia, upon a conviction for an offence stated therein to have been committed "at Hopewell, in the County of Pictou." The County of Pictou appeared to be of a greater extent than the Municipality of the County of Pictou,—there being also four incorporated towns within the county limits—and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the Municipality of the County of Pictou. The Nova Scotia statute of 1895 respecting County Corporations (58 Vic. c. 3, s. 8), contains a schedule which mentions Hopewell as a polling district in Pictou County entitled to return two Councillors to the County Council.

Held, that the Court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place so mentioned in the warrant was within the territorial limits of the police division.

Held, also, that the jurisdiction of a Judge of the Supreme Court of Canada in matters of *habeas corpus* in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment.

Ex parte James W. Macdonald, .. xxvii., 683

2. — Appeal — Change of Position of Parties.

Upon the calling for hearing of the appeal (which was from a judgment of the Supreme Court of British Columbia, refusing a writ of Habeas Corpus for the possession of Quai Sing, a Chinese female under age), counsel for the respondent produced to the court an order of the Supreme Court of British Columbia, dated subsequently to the judgment appealed from, by which it appeared that the respondent, the matron of a rescue home, had been appointed by that court as guardian to the infant in

question, whereupon the Chief Justice intimated that, under the circumstances, it was useless to proceed with the hearing of the appeal, it being impossible that any order could be made thereon respecting the possession of the infant being given to the appellant.

The appeal was consequently dismissed with costs.

Seid Sing Kaw v. *Bowes*, 17th May, 1898.

"HANSARD" STAFF.

CIVIL SERVICE — EXTRA SALARY — ADDITIONAL REMUNERATION—PERMANENT EMPLOYEES—51 VIC. c. 12, s. 51.

See Statute, 35.

HARBOURS.

CANADIAN WATERS—PROPERTY IN BEDS—PUBLIC HARBOURS — ERECTIONS IN NAVIGABLE WATERS — INTERFERENCE WITH NAVIGATION—RIGHT OF FISHING—POWER TO GRANT — RIPARIAN PROPRIETORS—GREAT LAKES AND NAVIGABLE RIVERS—OPERATION OF MAGNA CHARTA — PROVINCIAL LEGISLATION—R. S. O. (1887) c. 24, s. 47—55 VIC. c. 10, ss. 5 TO 13, 19 AND 21 (O.)—R. S. Q. ARTS. 1375 TO 1378.

The beds of public harbours not granted before Confederation are the property of the Dominion of Canada. *Holman* v. *Green* (6 Can. S. C. R. 707), followed. The beds of all other waters not so granted belong to the respective provinces in which they are situate, without any distinction between the various classes of waters.

Per Gwynne, J.—The beds of all waters are subject to the jurisdiction and control of the Dominion Parliament so far as required for creating future harbours, erecting beacons or other public works for the benefit of Canada, under the British North America Act, s. 92, item 10, and for the administration of the fisheries.

R. S. C. c. 92, "An Act respecting certain works constructed in or over navigable rivers," is *intra vires* of the Dominion Parliament.

The Dominion Parliament has power to declare what shall be deemed an interference with navigation and to require its sanction to any work in navigable waters.

A province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse or the like, and the grantee on obtaining the sanction of the Dominion may build thereon subject to compliance with R. S. C. c. 92.

Where the provisions of Magna Charta are not in force, as in Quebec, the Crown in right of the province may grant exclusive rights of fishing in tidal waters, except in tidal public harbours, in which, as in public harbours, the Crown in right of the Dominion, may grant the beds and fishing rights. Gwynne, J., dissenting.

Per Gwynne, J.—R. S. O. c. 24, s. 47, is *ultra vires* so far as it assumes to authorize the sale of land covered with water within public harbours.

The margins of navigable rivers may be sold if there is an understanding with the Dominion Government for protection against interference with navigation.

The Act of 1892 and R. S. Q. arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are *ultra vires*.

In the matter of Jurisdiction over Provincial Fisheries .. .. xxvi., 444

HEIRS.

1.—WILL, CONSTRUCTION OF—"OWN RIGHT HEIRS" — LIMITING TESTAMENTARY POWER OF DEVISEE — CONDITIONAL LIMITATIONS — APPEAL — ACQUIESCENCE BY APPELLANTS IN JUDGMENT APPEALED FROM—COSTS—VESTING OF ESTATE.

Under a devise to the testator's "own right heirs" the beneficiaries would be those who would have taken in the case of intestacy unless a contrary intention appears, and where there was a devise to the only daughter of the testator conditionally upon events which did not occur, and, under the circumstances, could never happen, the fact of such a devise was not evidence of such contrary intention, and the daughter inherited as the right heir of the testator.

In re Ferguson, Turner v. *Bennett.*

Carson v. *Coatsworth* .. .. .. xxviii., 38

2.—STATUTE, CONSTRUCTION OF — ESTATES TAIL, ACTS ABOLISHING—R. S. N. S. (1 SER.) c. 112—R. S. N. S. (2 SER.) c. 112—R. S. N. S. (3 SER.) c. 111—28 VIC. c. 2 (N. S.)—WILL—CONSTRUCTION OF—EXECUTORY DEVISE OVER—"DYING WITHOUT ISSUE" — "LAWFUL HEIRS"—"HEIRS OF THE BODY"—ESTATE IN REMAINDER EXPECTANT—STATUTORY TITLE—R. S. N. S. (2 SER.) c. 144, ss. 23 AND 24—TITLE BY WILL—CONVEYANCE BY TENANT IN TAIL.

See Will, 17.

3.—Will—Construction of — Words of Futurity—Life Estate—Joint Lives—Time for Ascertainment of Class—Survivor Dying without Issue—"Lawful Heir."

See Will, 18.

HIGHWAY.

1.—Public Highway—Registered Plan—Dedication — User — Statute, Construction of—Retrospective Statute 46 Vic. c. 18 (O.)—Estoppel.

The right vested in a municipal corporation by 46 Vic. c. 18 (O.), to convert into a public highway a road laid out by a private person on his property, can only be exercised in respect to private roads, to the use of which the owners of property abutting thereon were entitled.

Gooderham et al. v. *The City of Toronto*, xxv., 246

2.—Municipal Corporation — Repair of Streets—Pavements — Assessment on Property Owner—Double Taxation—24 Vic. c. 39 (N. S.)—53 Vic. c. 60, s. 14 (N. S.).

By sec. 14 of the Nova Scotia Statute, 53 Vic. c. 60, the City Council of Halifax was authorized to borrow money for paving the sidewalks of the City with concrete or other permanent material, one-half the cost to be a charge against the owners of the respective properties in front of which the work should be done, and to be a first lien on such properties. A concrete sidewalk was laid, under authority of this statute, in front of L.'s property, and he refused to pay half the cost on the ground that his predecessor in title had in 1867, under the Act 24 Vic. c. 39, furnished the material to construct a brick sidewalk in front of the same property, and that it would be imposing a double tax on the property if he had to pay for the concrete sidewalk as well.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid; that it authorized no exception in favour of property owners who had contributed to the cost of sidewalks laid under the Act of 1861; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the same thing, because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891, had become worn out, useless and dangerous.

The City of Halifax v. *Lithgow*, xxvi., 336

3.—Municipal Corporation—Highways—Old Trails in Rupert's Land—Substituted Roadway—R. S. C. c. 50, s. 108 — Reservation in Crown Grant — Dedication—User—Estoppel —Assessment of Lands Claimed as Highway—Evidence.

The user of old travelled roads or trails over the waste lands of the Crown in the North-West Territories of Canada, prior to the Dominion Government Survey thereof, does not give rise to a presumption that the lands over which they passed were dedicated as public highways.

The land over which an old travelled trail had formerly passed, leading to the Hudson Bay Trading Post at Edmonton, N. W. T., had been enclosed by the owner, divided into town lots and assessed and taxed as private property by the municipality, and a new street substituted therefor, as shown upon registered plans of sub-division and laid out upon the ground, had been adopted as a boundary in the descriptions of lands abutting thereon in the grants thereof by Letters Patent from the Crown.

Held, reversing the decision of the Supreme Court of the North-West Territories, that under the circumstances there could be no presumption of dedication of the lands over which the old trail passed as a public highway, either by the Crown or by the private owner, notwithstanding long user of the same by settlers in that district prior to the Dominion Government Survey of the Edmonton Settlement.

Heiminck v. *Town of Edmonton*, xxviii., 501

4.—Old Trails in Rupert's Land—Crown Grant — Squatter's Plan of Sub-division—Substitution of New Way—Dedication—Highway—Adopting New Street as a Boundary.

A squatter in possession of public lands near the old Hudson Bay Trading Post at Edmonton, who afterwards became patentee of the greater part of the lands he occupied, had made a plan of sub-division thereof into town lots which showed a new roadway or street laid down in the place of the old travelled trail across said lands leading to the trading post, and subsequently, the Crown, in making grants, described several parcels of the lands in the patents as being bounded and abutting upon the said street or roadway, so laid down on the plan.

Held, affirming the decision of the Supreme Court for the North-West Territories, that the space so shown upon the plan, as laid out for a street, had been adopted

and dedicated by the Crown as and for a public street and highway in substitution for the old travelled trail or roadway across said lands.

Brown et al. v. *The Town of Edmonton*, 24th May, 1894 .. .. xxviii., 510

5.—Repairs of Streets—Liability for Non-feasance.

See Municipal Corporation, 25.

6.—Negligence—Obstruction of Street—Assessment of Damages—Questions of Fact—Action of Warranty.

See Appeal, 44.
" Warranty.

7.—Constitutional Law—Municipal Corporation—Powers of Legislature—License — Monopoly — Highways and Ferries — Navigable Streams — By-laws and Resolutions — Intermunicipal Ferry—Tolls—Disturbance of Licensee — North-west Territories Act, R. S. C. c. 50, ss. 13 and 24—B. N. A. Act (1867), c. 92, ss. 8, 10 and 15—Rev. Ord. N. W. Ter. (1888) c. 28—Ord. N. W. T. No. 7 of 1891-92, s. 4—Companies, Club Associations and Partnerships.

See Municipal Corporation, 26.

8.—Waterworks—Repairs — Injunction—R. S. Q. Art. 4485.

See Injunction.

9.—Title to Portion of Highway—Legislative Grant of Soil—Gas Pipes—Fixtures — Assessment — Exemptions—11 Vic. c. 14 (Can.)—55 Vic. c. 48 (O.)—"Ontario Assessment Act, 1892."

See Assessment, 7 *bis*.

10.—Municipal Corporation—Highway — Encroachment upon Street—Negligence — Nuisance — Obstruction of Show-window—Municipal Officers — Misfeasance During Prior Ownership — Non-feasance — Statutable Duty—Damages.

See Municipal Corporation, 37.

HIRE OF PERSONAL SERVICES.

Appointment of Officers—Summary Dismissal—Libellous Resolution—52 Vic. c. 79, s. 79 (Q.).

See Master and Servant, 8.

HIRE RECEIPT.

Property, Real and Personal — Immovables by Destination—Movables Incorporated with Freehold—Severance from Realty—Contract—Resolutory Condition—Conditional Sale—Hypothecary Creditor—Unpaid Vendor—Arts. 379, 2017, 2083, 2085, 2089, C. C.

See Contract, 30.

HUSBAND AND WIFE.

1. — Married Woman's Property — Separate Estate—Contract by Married Woman — Separate Property Exigible—C. S. U. C. c. 73—35 Vic. c. 16 (O.)—R. S. O. (1877) cc. 125 and 127—47 Vic. c. 19 (O.).

See Debtor and Creditor, 1.

2.—Deed to Wife—Execution by Husband, Effect of—Assent—Estoppel.

See Title to Land, 3.

3.—Partnership—Dissolution — Married Woman—Benefit Conferred on Wife During Marriage — Contestation — Priority of Claims.

See Partnership, 1.

4.—Don Mutuel—Property Excluded—Acquisition After Marriage—Resiliation for Value—Right of Wife to Possession.

See Marriage Settlement.

5.—Government of Quebec — Retired Official—Interest of Wife in Pension—Commutation.

See Pension de Retraite.

6.—Purchase of Land by Wife—Re-sale Garnishee of Purchase Money on—Debt of Husband—Statute of Elizabeth — Hindering or Delaying Creditors.

See Practice, 19.

7.—Constitutional Law—Marital Rights—Married Woman—Separate Estate—Jurisdiction of N. W. Territorial Legislature — Statute—Interpretation of—40 Vic. c. 7, s. 3 and Amendments—R. S. C. c. 50—N. W. Ter. Ord. No. 16 of 1889.

See Married Woman, 2.

HYPOTHEC.

See Mortgage.
" Privileges and Hypothecs.

IMMOVABLE PROPERTY.

1.—Vendor and Purchaser—Unpaid Vendor — Conditional Sale — Suspensive Condition — Movables Incorporated with Freehold—Immovables by Destination — Hypothecary Charges — Arts. 375 *et seq.* C. C.

A suspensive condition in an agreement for the sale of movables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid condition.

In order to give movable property the character of immovables by destination, it is necessary that the person incorporating the movables with the immovables should be, at the time, owner both of the movables and of the real property with which they are so incorporated. *Lainé* v. *Béland* (26 Can. S. C. R. 419), and *Filiatrault* v. *Goldie* (Q. R. 2 Q. B. 368), distinguished.

Decision of the Court of Queen's Bench affirmed, Girouard, J., dissenting.

La Banque d'Hochelaga v. *The Waterous Engine Works Co.* .. .. xxvii., 406

2.—Mortgage, Construction of—Trade Fixtures — Chattels — Tools and Machinery of a "Going Concern"—Constructive Annexation — Mortgagor and Mortgagee.

The purposes to which premises have been applied should be regarded in deciding what may have been the object of the annexation of movable articles in permanent structures with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold, and where articles have been only slightly affixed but in a manner appropriate to their use and showing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that both as to the degree and object of the annexation, they became part of the realty.

Haggart v. *Town of Brampton* .. xxviii., 174

3.—Property, Real and Personal—Immovables by Destination—Movables Incorporated with Freehold—Severance From Realty—Contract—Resolutory Condition—Conditional Sale—Hypothecary Creditor—Unpaid Vendor—Arts. 379, 2017, 2083, 2085, 2089, C. C.

See Contract, 30.

4.—Gas Pipes—Title to Portion of Highway—Fixtures—Legislative Grant.

See Assessment, 7 *bis.*

INDIAN TREATIES.

Constitutional Law — Province of Canada—Surrender of Indian Lands —Annuity to Indians—Revenue from Indian Lands—Increase of Annuity—Charge upon Lands—British North America Act, 1867, s. 109.

See Constitutional Law, 13.

INFANT.

Negligence of Servant—Contributory Negligence.

The doctrine of contributory negligence does not apply to an infant of tender age. *Gardner* v. *Grace* (1 F. & F. 359) followed.

Merritt v. *Hepenstal* .. .. .. xxv., 150

INJUNCTION.

Municipal Corporation — Waterworks — Extension of Works — Repairs — By-law — Resolution — Agreement in Writing—Highways and Streets—R. S. Q. Art. 4485—Art. 1033*a* C. C. P.

By a resolution of the Council of the Town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and to lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the River Chicoutimi, at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks, and had it in operation within the time prescribed, but the system proving insufficient, a company was formed in 1895 under the provisions of R. S. Q. art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir and to make new excavations in the streets for these purposes, without receiving any further authority from the council.

Held, (Gwynne, J., dissenting), reversing the judgment appealed from, that these were

not merely necessary repairs, but new works, actually part of the system required to be completed during the year 1892, and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the Council of the Town.

Held, further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of article 1033*a* of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works.

La Ville de Chicoutimi v. *Légaré*, xxvii., 329

INSOLVENCY.

1.—Sheriff—Trespass—Sale of Goods by Insolvent—Bona Fides—Judgment of Inferior Tribunal—Estoppel—Bar to Action — Fraudulent Preferences - Pleading—Res Judicata.

K. who was a trader in insolvent circumstances, sold the whole of his stock in trade to D., at a time when two of his creditors had, to D.'s knowledge, recovered judgments against him. The sheriff afterwards seized the goods under executions issued upon judgments subsequently obtained, and, upon an interpleader issue tried in the County Court, the jury found that K. had sold the goods with intent to prefer the creditors holding the prior judgments, but that D. had purchased in good faith and without knowing of such intention on the part of the vendor. Judgment was thereupon entered against D. in the County Court, and this judgment was affirmed by the Supreme Court *en banc*. In an action afterwards brought by D. against the sheriff for trespass in seizing the goods, he obtained a verdict, which was however, set aside by the court *en banc*, a majority of the Judges holding that the County Court judgment was a complete bar to the action.

On appeal to the Supreme Court of Canada;

Held, reversing the judgment of the Supreme Court of British Columbia, that as the evidence showed that the goods had been purchased by D. in good faith for his own benefit, the sale was not void under the statute respecting fraudulent preferences.

Held, also, that the County Court judgment, being a decision of an inferior court of limited jurisdiction, could not operate as a bar in respect of a cause of action in the Supreme Court beyond the jurisdiction of the County Court.

Held, further, that even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel by a plea setting up in detail all the facts necessary to constitute the estoppel, and that from the evidence in the case it appeared that no such estoppel could have been established.

Taschereau, J., dissented.

Davies v. ***McMillan***, 1st May, 1893.

2.—Assignment in Trust for Creditors—Sale of Estate to Insolvent's Wife—Guarantee by Creditor and Inspector—Trustee — Account for Profits.

The plaintiffs were creditors of the insolvent estate of J., who assigned under the Act relating to Assignments and Preferences to Creditors. The defendant A. was also a creditor, and the defendant L., an inspector of the estate. The assets were offered for sale by tender and purchaser by the insolvent's wife, who gave, as security for payment, notes indorsed by defendant A. After the tender of the purchaser had been approved by the inspectors, A. induced the defendant L. to join him in securing the selves. The estate paid a small dividend, on the stock so purchased to protect themselves. The estate paid a small dividend, and the plaintiff's brought an action to have defendants account for any profit they may have made out of the sale of the stock. On the trial, judgment was given for the plaintiff, and a reference ordered to ascertain what profit the defendants had received. The Divisional Court varied this judgment (23 O. R. 573), by declaring that plaintiffs should receive the difference between their claims against the estate and what they would have received in common with the other creditors by way of dividend, with liberty to apply to the court if the amount could not be agreed upon. The Court of Appeal for Ontario reversed the decision of the Divisional Court and dismissed the action, holding that no loss to the estate had been proved. (21 Ont. App. R. 242).

The Supreme Court of Canada allowed an appeal and restored the judgment of the trial judge, (Taschereau, J., dissenting), holding that the defendant L., as inspector, could not obtain an advantage for himself from his position, and that the creditors were entitled to a reference to ascertain what profit, if any, he had derived from the transaction.

Segsworth v. *Anderson*, 15th January, 1895. xxiv., 699

3.—Assignment—Preference—Payment in Money—Cheque of Third Party—R. S. O. c. 124, s. 3.

In an appeal from a judgment of the Court of Appeal for Ontario (23 Ont. App. R. 439), which held that indorsing and giving a creditor the unaccepted cheque of a third person in the debtor's favour is not a payment of money to the creditor within the meaning of the third section of chapter 124 of the Revised Statutes of Ontario (1887) and overruling *Armstrong* v. *Hemstreet* (22 O. R. 366);

The Supreme Court of Canada affirmed the decision of the Court of Appeal, and dismissed the appeal with costs.

Fraser et al. v. *Davidson & Hay*, 1st May, 1897 .. .. xxviii., 272

4.—Pressure—Assignment of Expected Profits — Fraudulent Preferences—Statute of Elizabeth—Assets Exigible in Execution.

The appeal was from the judgment of the Court of Appeal for Ontario, affirming the judgment of Street, J., in the High Court of Justice, which dismissed the action of the plaintiffs with costs. The action was brought to set aside an assignment, by way of security, to the defendant of an interest in the profits expected to be earned under a contract for the performance of work, on the ground that it was made to defeat, hinder, defraud, delay and prejudice the creditors of the assignor (who was insolvent), and to give the assignee an unjust preference, In the trial court the decision in favour of the defendant was based on the ground that the assignment had been made under pressure, and was therefore valid. The Court of Appeal affirmed this judgment, but upon other grounds, holding that as the subject of the assignment did not consist of assets which could be reached by creditors at the time when it was made, the assignment did not come within the Act respecting Assignments and Preferences. (24 Ont. App. R. 153).

The Supreme Court of Canada dismissed the appeal with costs, for the reasons given by the Judges in the Court of Appeal for Ontario.

Blakely et al. v. *Gould*, 10th Nov., 1897, xxvii., 682

5.—Right of Succession—Insolvency of One Heir—Sale by Curator Before Partition—Art. 710 C. C.

See Retrait Successoral.

6.—Transfer of Property by Insolvent—Knowledge of Creditor—Fraudulent Preference—Arts. 1035, 1036, 1169 C. C.

See Debtor and Creditor, 4.

7.—Report of Collocation—Contestation of—Appeal—Amount in Controversy—Pecuniary Interest of Appellant—Arts. 746, 747 C. C. P.

See Appeal, 45.

8.—Debtor and Creditor—Fraudulent Preferences — Chattel Mortgage — Advances of Money — Solicitor's Knowledge of Circumstances—R. S. O. (1887) c. 124—54 Vic. c. 20 (Ont.)—58 Vic. c. 23 (Ont.).

See Debtor and Creditor, 12.

9.—Assignment for Benefit of Creditors—Preferred Creditors—Money Paid under Voidable Assignment—Levy and Sale under Execution—Statute of Elizabeth.

See Debtor and Creditor, 13.

INSURANCE, ACCIDENT.

1. — Renewal of Policy — Payment of Premium — Promissory Note—Instructions to Agent—Agent's Authority—Finding of Jury.

A policy issued by the Manufacturers' Acc. Ins. Co. in favour of P. contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect unless the premium was paid prior to any accident on account of which a claim should be made, and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director and countersigned by the agent. P. having been killed in a railway accident payment on the policy was refused on the ground that it had expired and not been renewed. In an action by the widow for the insurance it was shown that the local agent of the company had requested P. to renew and had received from him a promissory note for $15 (the premium being $16), which the father of the assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt, and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it

was agreed between him and P. that there was to be no insurance until it was paid, and that he gave no renewal receipt, and was paid no cash. Some four years before this the said agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore. The note was never paid, but remained in possession of the agent, the company knowing nothing about it. The jury gave no general verdict, but found in answer to questions that a sum was paid in cash and the note given and accepted as payment of the balance of the premium, and that the paper given to P. by the agent, as sworn to by P.'s father, was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company.

Held, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that the fair conclusion from the evidence was, that as the agent had been employed to complete the contract and had been entrusted with the renewal receipt, P. might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority, and the policy not forbidding it; and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the court according to the practice in Nova Scotia.

Held, further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium, and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial, as the company might have supposed that the plaintiff would seek to show that such receipt had been obtained and were not taken by surprise.

The Manufacturers Accident Insurance Company v. *Pudsey* .. .. xxvii., 374

2. — Accident Insurance — Condition in Policy—Notice—Condition Precedent —Action.

A policy of insurance against accidents contained a condition that in the event of accident, written notice, containing the full name and address of the insured, with full particulars of the accident, should be given within thirty days of its occurrence, to the Manager for the United States, at Boston, Mass., or the agent of the corporation whose name was endorsed thereon.

The insured having died from an accident, his widow, as beneficiary, brought an action on the policy to which the company pleaded want of notice under the above condition. The plaintiff demurred to this plea, and her demurrer was allowed by the Supreme Court of New Brunswick.

On appeal, the Supreme Court of Canada reversed the judgment appealed from, Gwynne, J., dissenting, and held that the giving of notice in conformity with the condition of the policy was a condition precedent to a right of action thereon, and that the demurrer to the plea must be overruled.

The Employers' Liability Assurance Co. v. *Taylor*, 21st November, 1898 .. .. xxix.

INSURANCE COMPANY.

Employment of Agent—Agent Acting for Rival Companies—Dismissal.

See Master and Servant, 6.

INSURANCE, FIRE.

1. — Condition in Policy — Particular Account of Loss—Failure to Furnish —Finding of Jury—Evidence.

A policy of insurance against fire required that in case of loss the insured should, within fourteen days, furnish as particular an account of the property destroyed, etc., as the nature and circumstances of the case would admit of. The property of N., insured by this policy, was destroyed by fire and in lieu of the required account he delivered to the agent of the insurers an affidavit in which, after stating the general character of the property insured, he swore that his invoice book had been burned and he had no adequate means of estimating the exact amount of his loss, but that he had made as careful an estimate as the nature and circumtances of the case would admit of, and found the loss to be between $3,000 and $4,000. An action on the policy was defended on the ground of non-compliance with said condition. On the trial the jury answered all the questions submitted to them, except two, in favour of N. These two questions, whether or not N. could have made a tolerably complete list of the contents of his store immediately before the fire, and whether or not he delivered as particular an account, etc., (as in the conditions)

were not answered. The Trial Judge gave judgment in favour of N., which the court *en banc* reversed, and ordered judgment to be entered for the company.

Held, affirming the decision of the court *en banc*, that as the evidence conclusively showed that N., with the assistance of his clerk, could have made a tolerably correct list of the goods lost, the condition was not complied with.

Held, further, that as under the evidence the jury could not have answered the questions they refused to answer in favour of N., a new trial was unnecessary, and judgment was properly entered for the company.

Nixon v. *The Queen Insurance Co.*, xxiii., 26

2.—Fire Insurance—Condition Against Assigning Policy—Breach of Condition.

A condition in a policy of insurance against fire provided that if the policy or any interest therein should be assigned, parted with, or in any way encumbered, the insurance should be absolutely void, unless the consent of the company thereto was obtained and indorsed on the policy. S. the insured under said policy assigned, by way of chattel mortgage, all the property insured and all policies of insurance thereon, and all renewals thereof to a creditor. At the time of such assignment S. had other insurance on said property, the policies of which did not prohibit their assignment. The consent of the company to the transfer was not obtained and indorsed on the policy.

Held, affirming the decision of the Supreme Court of Nova Scotia, that the mortgage of the policy by S., without such consent, made it void, and he could not recover the amount insured in case of loss.

Salterio v. *City of London Fire Insurance Co.*, xxiii., 32

3.—Condition in Policy—Change of Title in Property Insured—Chattel Mortgage.

A policy of insurance against fire provided that in the event of any sale, transfer or change of title in the property insured the liability of the company should thenceforth cease; that the policy should not be assignable without the consent the company indorsed thereon; and that all encumbrances effected by the assured must be notified within fifteen days therefrom.

Held, reversing the decision of the Supreme Court of Nova Scotia, that giving a chattel mortgage on the property insured was not a sale or transfer within the meaning of this condition, but it was a "change of title" which avoided the policy. *Sovereign Ins. Co.* v. *Peters* (12 Can. S. C. R. 33), distinguished.

Held, further, that it was an incumbrance even if the condition meant an incumbrance on the policy.

Citizens' Insurance Co. of Canada v. *Salterio*, xxiii., 155

4.—Insurance Against Fire—Mutual Insurance Company—Contract—Termination—Notice—Statutory Conditions—R. S. O. (1887) c. 167—Waiver—Estoppel.

B. applied to a mutual company for insurance on his property for four years, giving an undertaking to pay the amounts required from time to time, and a four months' note for the first premium. He received a receipt beginning as follows: "Received from B. an undertaking for the sum of $46.50, being the premium for an insurance to the extent of $1,500 on the property described in his application of this date," and then providing that the company could cancel the contract at any time within fifty days by notice mailed to the applicant, and that non-receipt of a policy within the fifty days, with or without notice, should be absolute evidence of rejection of the application. No notice of rejection was sent to B., and no policy was issued wihin the said time which expired on March 4th, 1891. On April 17th, B. received a letter from the manager asking him to remit funds to pay his note maturing on May 15. He did so and his letter of remittance crossed another from the manager, mailed at Owen Sound, April 20th, stating the rejection of his application and returning the undertaking and note. On April 24th the insured property was destroyed by fire. B. notified the manager by telegraph, and on April 29th the latter wrote returning the money remitted by B., who afterwards sent it again to the manager and it was again returned. B. then brought an action, which was dismissed at the hearing, and a new trial was ordered by the Divisional Court, and affirmed by the Court of Appeal.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that there was a valid contract by the company with B. for insurance for four years; that the statutory conditions in the Ontario Insurance Act (R. S. O. [1887] c. 167) governed such contract, though not in the form of a policy; that if the provision as to non-receipt of a policy within fifty days was a

variation of the statutory conditions, it was ineffectual for non-compliance with condition 115 requiring variations to be written in a different coloured ink from the rest of the document, and if it had been so printed the condition as unreasonable; and that such provision, though the non-receipt of the policy might operate as a notice, was inconsistent with condition 19, which provides that notice shall not operate until seven days after its receipt.

Held, also, that there was some evidence for the jury that the company, by demanding and receiving payment of the note, had waived the right to cancel the contract, and were estopped from denying that B. was insured.

The Dominion Grange Mutual Fire Insurance Association v. *Bradt*, ... xxv., 154

5.—Insurance Against Fire—Condition of Policy — Fraudulent Statement — Proof of Fraud — Presumption — Assignment of Policy—Fraud by Assignor.

Where an insurance policy is to be forfeited if the claim is in any respect fraudulent, it is not essential that the fraud should be directly proved; it is sufficient if a clear case is established by presumption, or inference, or by circumstantial evidence.

The assignee of the policy cannot recover on it if fraud is established against the assignor.

The North British and Mercantile Insurance Company v. *Tourville* .. .. xxv., 177

6. — Conditions in Policy — Breach — Waiver — Recognition of Existing Risk After Breach—Authority of Agent.

A policy of fire insurance on a factory and machinery contained a condition making it void if the said property was sold or conveyed, or the interest of the parties therein changed.

Held, affirming the decision of the Supreme Court of New Brunswick, that by a chattel mortgage, given by the assured on said property, his interest therein was changed and the policy forfeited under said condition.

Held, further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach.

Torrop v. *The Imperial Fire Insurance Co.*, xxvi., 585

7.—Fire Insurance—Condition in Policy —Notice of Subsequent Insurace—Inability of Assured to give Notice.

By a condition in a policy of insurance against fire the insured was "forthwith" to give notice to the company of any other insurance on the same property, and have a memo. thereof indorsed on the policy; otherwise the policy would be void provided that if such notice should be given after it issued the company had the option to continue or cancel it.

Held, affirming the judgment of the Supreme Court of New Brunswick, that this condition did not apply to a case in which the application for other insurance was accepted on the day on which the property insured was destroyed by fire and notice of such acceptance did not reach the assured until after the loss.

The Commercial Union Assurance Co. v. *Temple*, 21st November, 1898 .. .. .. xxix.

8.—Fire Insurance—Conditions of Policy —Notice—Proofs of Loss—Change in Risk—Insurable Interest—Mortgage Clause—Arbitration—Condition Precedent — Foreign Statutory Conditions—R. S. O. (1897) c. 203, s. 168—Transfer of Mortgage — Assignment of Rights under Policy after Loss—Signification of Assignment—Arts. 1571, 2475, 2478, 2483, 2574, 2576 C. C.

Where a condition in a policy of insurance against fire provided that any change material to the risk, within the control or knowledge of the insured should avoid the policy, unless notice was given to the company;

Held, that changing the occupation of the insured premises from a dwelling into an hotel was a change material to the risk within the meaning of this condition.

A mortgagee of insured premises to whom payment is to be made in case of loss "as his interest may appear" cannot recover on the policy when his mortgage has been assigned and he has ceased to have any interest therein at the time of the loss.

In the Province of Quebec, an assignment of rights under a policy of insurance is ineffectual unless signification thereof has been made in compliance with the provisions of article 1571 of the Civil Code.

Where a condition in the policy provided that no action should be maintainable against the company for any claim under the policy until after an award should have been obtained in the manner therein provided fixing the amount of the claim:

Held, that the making of such award was a condition precedent to any right of action to recover a claim for loss under the policy.

Quære, per Taschereau, J.—Do Ontario statutory conditions printed on the back of a policy issued in Quebec and not referred to in the body of the policy, form part of the contract between the parties?.

Guerin v. *Manchester Fire Assce. Co.*, 21st November, 1898 .. .. xxix.

9.—Landlord and Tenant—Loss by Fire—Cause of Fire — Negligence—Civil Responsibility—Legal Presumption—Rebuttal of — Onus of Proof — Hazardous Occupation — Extra Premiums—Arts. 1053, 1064, 1071, 1626, 1627, 1629, C. C.

See Landlord and Tenant, 2.

INSURANCE, GUARANTEE.

Guarantee Policy—Honesty of Employee —Notice of Defalcation.

See Surety, 3.

INSURANCE, LIFE.

1.—Premium Notes — Non-Payment—Forfeiture — Conditions — Collateral Agreements.

The assured gave to the company to cover the first annual premium upon a policy of life insurance, two agreements in the form of promissory notes payable in three and six months from the date of the policy, each of which contained an undertaking or condition by the assured, should default be made in payment at maturity, that the policy should thereby become void. The policy contained no condition as to forfeiture for non-payment of premiums. The first note was not paid at maturity and, while it remained still unpaid and before the second note fell due, the assured died.

Held, affirming the decision of the Court of Appeal for Ontario (20 Ont. App. R. 564), that, by the failure in payment of the portion of the premium payable three months after the date of the policy, as agreed by the overdue instrument, the policy had become void.

Frank v. *The Sun Life Assurance Co.*, 22nd May, 1894.

2.—Condition in Policy—Note Given for Premium — Non-payment — Demand of Payment after Maturity—Waiver.

A condition in a policy of life insurance provided that if any premium, or note, etc., given therefor was not paid when due, the policy should be void.

Held, affirming the decision of the Court of Appeal (Ont.), that where a note given for a premium under said policy was partly paid when due, and renewed, and the renewal was overdue and unpaid at the death of the assured, the policy was void.

Held, further, that a demand for payment after the maturity of the renewal was not a waiver of the breach of the condition so as to keep the policy in force.

McGreachie v. *North American Life Ins. Co.*, xxiii., 148

3.—Wagering Policy — Nullity—Waiver of Illegality—Insurable Interest—Estoppel—14 Geo. III., c. 48 (Imp.)—Arts. 2474, 2480, 2590 C. C.

A condition in a policy of life insurance by which the policy is declared to become incontestable upon any ground whatever after the lapse of a limited period, does not make the contract binding upon the insurer in the case of a wagering policy.

Judgment of the Court of Queen's Bench reversed, Sedgewick, J., dissenting.

The Manufacturers Life Insurance Co. v. *Anctil* .. .. xxviii., 103

4.—Conditions and Warranties—Indorsements on Policy—Inaccurate Statements — Misrepresentations—Latent Disease—Material Facts — Cancellation of Policy—Return of Premium—Statute, Construction of—55 Vic. c. 39, s. 33, (Ont.).

The provisions of the second sub-section of section thirty-three of "The Insurance Corporations Act, 1892," (Ont.), limiting conditions and warranties indorsed on policies providing for the avoidance of the contract by reason of untrue statement in the applications to cases where such statements are material to the contract, do not require the materiality of the statements to appear by the indorsements, but the contract will be avoided only when such statements may subsequently be judicially found to be material as provided by the third sub-section.

Misrepresentations upon an application for life insurance so found to be material will avoid the policy notwithstanding that they may have been made in good faith and in the conscientious belief that they were true. *Venner* v. *The Sun Life Insurance Company* (17 Can. S. C. R. 394), followed.

Jordan et al. v. *Provincial Provident Institution* .. .. xxviii., 554

5.—Partnership—Insurance on Members —Registered Declaration—Evidence to Contradict—Art. 1835 C. C.—C. S. L. C. c. 65, s. 1.

See Evidence, 8.

6.—Insurance Co.—Appointment of Medical Examiner—Breach of Contract—Authority of Agent.

See Contract, 18.

7.—Appeal—Special Leave—60 & 61 Vic. (D.) c. 34, s. 1 (*e*)—Benevolent Society Certificate.

See Benefit Association, 2.

INSURANCE, MARINE.

1.—Marine Insurance—Misrepresentation—Vessel "When Built"—Repairs to Old Vessel—Change of Name—Register.

Where payment of an insurance risk is resisted on the ground of misrepresentation it ought to be made very clear that such misrepresentation was made.

Misrepresentation made with intent to deceive vitiates a policy however trivial or immaterial to the risk it may be; if honestly made it only vitiates when material and substantially incorrect.

Representation in a marine policy that the vessel insured was built in 1890, when the fact was that it was an old vessel, extensively repaired, and given a new name, and register, but containing the original engine, boiler and machinery with some of the old material, is a misrepresentation and avoids the policy whether made with intent to deceive or not. Taschereau, J., dissenting.

Nova Scotia Marine Co. v. *Stevenson*, xxiii., 137

2.—Trover—Conversion of Vessel—Joint Owners—Abandonment—Salvage.

A vessel, partly insured, was wrecked and the ship's husband abandoned her to the underwriters, who sold her and her outfit to one K. The sale was afterwards abandoned and the underwriters notified the ship's husband that she was not a total loss, and requested him to take possession. He paid no attention to the notice and the vessel was libelled by K. for salvage and sold under decree of court. The uninsured owner brought an action against the underwriters for conversion of her interest.

Held, affirming the decision of the Supreme Court of New Brunswick, that the ship's husband was agent of the uninsured owner in respect of the vessel, and his conduct precluded her from bringing the action; that he might have taken possession before the vessel was libelled; and that the insured owner was not deprived of his interest by any action of the underwriters, but by the decree of the court under which she was sold for salvage.

Rourke v. *Union Ins. Co.* .. .. xxiii., 344

3.—Voyage Policy—"At and From" a Port—Construction of Policy—Usage.

A ship was insured for a voyage "at and from Sydney to St. John, N. B. there and thence," etc. She went to Sydney for orders, and without entering within the limits of the port as defined by statute for fiscal purposes, brought up at or near the mouth of the harbour, and having received her orders by signal attempted to put about for St. John, but missed stays and was wrecked. In an action on the policy evidence was given establishing that Sydney was well known as a port of call, that ships going there for orders never entered the harbour, and that the insured vessel was within the port according to a Royal Surveyor's Chart furnished to navigators.

Held, affirming the decision of the Supreme Court of New Brunswick, that the words "at and from Sydney" meant at and from the first arrival of the ship; that she was at Sydney within the terms of the policy; and that the policy had attached when she attempted to put about for St. John.

St. Paul Fire and Marine Insurance Company v. *Troop et al.* .. .. xxvi., 5

4.—Goods Shipped and Insured in Bulk—Loss of Portion—Total or Partial Loss—Contract of Insurance—Construction.

M. shipped on a schooner a cargo of railway ties, for a voyage from Gaspé to Boston, and a policy of insurance on the cargo provided that "the insurers shall not be liable for any claim for damages on * * lumber * * but liable for a total loss of a part if amounting to five per cent. on the whole aggregate value of such articles." A certificate given by the agents of the insurers when the insurance was effected had on the margin the following memo., in red ink: "Free from partial loss unless caused by stranding, sinking, burning, or collision with another vessel, and amounting to ten per cent." On the voyage a part of the cargo was swept off the vessel during a storm, the value of which M. claimed under the policy.

Held, reversing the decision of the Supreme Court of New Brunswick, Taschereau, J., dissenting, that M. was entitled to recover; that though by the law of insurance the loss would only have been partial, the insurers, by the policy, had agreed to treat

it as a total loss; and that the memo. on the certificate did not alter the terms of the policy, the words "free from partial loss," referring not to a partial loss in the abstract applicable to a policy in the ordinary form, but to such a loss according to the contract, embodied in the terms of the policy.

Held, further, that the policy, certificates and memo. together constituted the contract and must be so construed as to avoid any repugnance between their provisions and any ambiguity should be construed against the insurers, from whom all the instruments emanated.

Mowat v. *The Boston Marine Insurance Co.*, xxvi., 47

peared that twelve feet of the shoe were off abaft the main chains, and another twelve feet, about off, forward, under the main chains. The butts on the bottom were open. The keel was more or less chafed and broken. The rudder was damaged and the rudder braces started off. There was a scar on the bilge on the port side, which looked as if the vessel had dragged or pounded on something. The sides of the keel were bruised more or less, and pieces off of it. The main keel was broomed up. The flying jib-boom and main-boom were broken, and the fore-boom was split. The Supreme Court of Nova Scotia, *en banc*, dismissed a motion for a new trial, and held, that there was sufficient evidence to warrant the jury in coming to the conclusion

out, but, as the wind increased a second anchor was put out. Subsequently, during a heavy-gale that sprang up from the north-west, with thick snow, both chains parted. The vessel was then on a lee shore, studded with reefs and shoals, and the tide low. She was abandoned by the master and crew, and the following morning was not visible from shore. Some time afterwards she was picked up at sea by salvors, and was brought into port and put upon the slip and repaired. When brought in she had four feet of water in her hold, and her cargo was badly damaged. On being put upon the slip it ap-

apply, and interest may be recovered against the Crown, according to the practice prevailing in that province.

The Queen v. *Henderson et al.* .. xxviii., 425

2.—EXPROPRIATION BY RAILWAY—AWARD—ADDITIONAL INTEREST — CONFIRMATION OF TITLE—DILIGENCE IN OBTAINING—RAILWAY ACT, 1888, ss. 162, 170, 172.

See Expropriation, 1.

3.—VENDOR AND PURCHASER—AGREEMENT TO PAY INTEREST—DELAY—DEFAULT OF VENDOR.

See Vendor and Purchaser, 2.

6.—Insurance Co.—Appointment of Medical Examiner—Breach of Contract—Authority of Agent.

See Contract, 18.

7.—Appeal—Special Leave—60 & 61 Vic. (D.) c. 34, s. 1 (*e*)—Benevolent Society Certificate.

See Benefit Association, 2.

INSURANCE, MARINE.

1.—Marine Insurance—Misrepresentation—Vessel "When Built"—Repairs to Old Vessel—Change of Name—Register.

Where payment of an insurance risk is

band that she was not a total loss, and requested him to take possession. He paid no attention to the notice and the vessel was libelled by K. for salvage and sold under decree of court. The uninsured owner brought an action against the underwriters for conversion of her interest.

Held, affirming the decision of the Supreme Court of New Brunswick, that the ship's husband was agent of the uninsured owner in respect of the vessel, and his conduct precluded her from bringing the action; that he might have taken possession before the vessel was libelled; and that the insured owner was not deprived of his interest by any action of the underwriters, but by the decree of the court under which she was sold for salvage.

Rourke v. *Union Ins. Co.* .. .. xxiii., 344

3.—Voyage Policy—"At and From" a Port—Construction of Policy—Usage.

A ship was insured for a voyage "at and from Sydney to St. John, N. B. there and thence," etc. She went to Sydney for orders, and without entering within the limits of the port as defined by statute for fiscal purposes, brought up at or near the mouth of the harbour, and having received her orders by signal attempted to put about for St. John, but missed stays and was wrecked. In an action on the policy evi-

of the insurers when the insurance was effected had on the margin the following memo., in red ink: "Free from partial loss unless caused by stranding, sinking, burning, or collision with another vessel, and amounting to ten per cent." On the voyage a part of the cargo was swept off the vessel during a storm, the value of which M. claimed under the policy.

Held, reversing the decision of the Supreme Court of New Brunswick, Taschereau, J., dissenting, that M. was entitled to recover; that though by the law of insurance the loss would only have been partial, the insurers, by the policy, had agreed to treat

1*a*.—Interest against Crown—Supreme Court Act—R. S. C. c. 135, s. 52—Consent to Reversal.

In a case before the Exchequer Court for return of duties improperly imposed, judgment was given against the claimants and afterwards affirmed by the Supreme Court, but reversed by the Privy Council and judgment ordered to be entered for the suppliant for the amount claimed with costs. On the case coming up again in the Exchequer Court judgment was entered for the principal sum only, interest being refused, and an appeal was taken to the Supreme Court. In the meantime the Crown presented a petition to the Privy Council for a declaration that the claimants were not entitled to interest under their Lordships judgment. The petition was dismissed, their Lordships stating that interest having been claimed, and the question not having been argued in any of the courts, it should be allowed. The Crown thereupon consented, under sec. 52 of the Supreme and Exchequer Courts Act, to a reversal of the judgment of the Exchequer Court as to interest.

Toronto Railway Co. v. *The Queen*, Oct., 1897; Cass. Sup. Ct. Prac. (2nd ed. by Masters), p. 87.

it as a total loss; and that the memo. on the certificate did not alter the terms of the policy, the words "free from partial loss," referring not to a partial loss in the abstract applicable to a policy in the ordinary form, but to such a loss according to the contract, embodied in the terms of the policy.

Held, further, that the policy, certificates and memo. together constituted the contract and must be so construed as to avoid any repugnance between their provisions and any ambiguity should be construed against the insurers, from whom all the instruments emanated.

Mowat v. *The Boston Marine Insurance Co.*, xxvi., 47

5.—Constructive Total Loss—Notice of Abandonment—Sale of Vessel by Master—Necessity for Sale.

If a disabled ship can be taken to a port and repaired, though at an expense far exceeding its value, unless notice of abandonment has been given there is not even a constructive total loss. If the ship is in a place of safety, but cannot be repaired where she is, nor taken to a port of repairs, and if instructions from the owner cannot be received for some weeks, the expense of preserving her, the danger of her being driven on shore and the probability of great deterioration in value during the delay will justify the master, when acting *bonâ fide* and for the benefit of all concerned, in selling without waiting for instructions, and the sale will excuse notice of abandonment.

The Nova Scotia Marine Insurance Co. v. *Churchill & Co.* .. .. xxvi., 65

6.—Partial Loss on Cargo—Stranding—Evidence—Jury Trial.

On a voyage from Porto Rico to Halifax, the "Donzella," put into Barrington, N. S., for shelter, the wind being south-east with a heavy snow storm prevailing. She was anchored near the lightship with one anchor out, but, as the wind increased a second anchor was put out. Subsequently, during a heavy gale that sprang up from the north-west, with thick snow, both chains parted. The vessel was then on a lee shore, studded with reefs and shoals, and the tide low. She was abandoned by the master and crew, and the following morning was not visible from shore. Some time afterwards she was picked up at sea by salvors, and was brought into port and put upon the slip and repaired. When brought in she had four feet of water in her hold, and her cargo was badly damaged. On being put upon the slip it appeared that twelve feet of the shoe were off abaft the main chains, and another twelve feet, about off, forward, under the main chains. The butts on the bottom were open. The keel was more or less chafed and broken. The rudder was damaged and the rudder braces started off. There was a scar on the bilge on the port side, which looked as if the vessel had dragged or pounded on something. The sides of the keel were bruised more or less, and pieces off of it. The main keel was broomed up. The flying jib-boom and main-boom were broken, and the fore-boom was split. The Supreme Court of Nova Scotia, *en banc*, dismissed a motion for a new trial, and held, that there was sufficient evidence to warrant the jury in coming to the conclusion that the vessel had been on shore, and beating on the rocks for some time, and on which they could properly find a verdict for the plaintiff, and that the Trial Judge had acted properly, under the circumstances, in refusing to withdraw the case from the jury.

On appeal to the Supreme Court of Canada, the judgment of the Supreme Court of Nova Scotia was affirmed, and the appeal dismissed with costs.

The British and Foreign Marine Insurance Co. v. *Rudolf*, 14th June, 1898 .. .. xxviii., 607

INTEREST.

1.—Statute, Construction of—Public Works—Railways and Canals—R. S. C. c. 37, s. 23—Contracts Binding on the Crown—Goods Sold and Delivered on Verbal Order of Crown Officials—Supplies in Excess of Tender—Errors and Omissions in Accounts Rendered—Findings of Fact—Interest—Arts. 1067 & 1077 C. C.—50 & 51 Vic. c. 16, s. 33.

Where a claim against the Crown arises in the Province of Quebec, and there is no contract in writing, the thirty-third section of "The Exchequer Courts Act," does not apply, and interest may be recovered against the Crown, according to the practice prevailing in that province.

The Queen v. *Henderson et al.* .. xxviii., 425

2.—Expropriation by Railway—Award—Additional Interest—Confirmation of Title—Diligence in Obtaining—Railway Act, 1888, ss. 162, 170, 172.

See Expropriation, 1.

3.—Vendor and Purchaser—Agreement to Pay Interest—Delay—Default of Vendor.

See Vendor and Purchaser, 2.

4.—Contract for Purchase of Land—Agreement to Pay Interest—Wilful Default of Vendor—Deposit of Purchase Money in Bank.

See Vendor and Purchaser, 3.

5.—Debt of Province of Canada to Dominion—Subsidies—Half-yearly Payments—Deduction of Interest—B. N. A. Act, ss. 112, 114, 115, 116, 118—36 Vic. c. 30 (D.)—47 Vic. c. 4 (D.).

See Constitutional Law, 10.

6.—Appeal from Court of Review—Appeal to Privy Council—Appealable Amount—Addition of Interest—C. C. P. Arts. 1115, 1178, 1178a—R. S. Q. Art. 2311—54 & 55 Vic. (D.) c. 25, s. 3, s.-s. 3—54 Vic. (Que.) c. 48 (amending Art. 1115 C. C. P.

See Appeal, 46.

7.—Mortgage—Loan to Pay off Prior Incumbrance—Interest — Assignment of Mortgage—Purchase of Equity of Redemption—Accounts.

See Mortgage, 8.

8.—Bonus—Usury Laws—C. S. C. c. 58—Art. 1785 C. C.

See Building Society.

INTERLOCUTORY PROCEEDINGS.

Appeal—Interlocutory Order—Trial by Jury—Final Judgment—R. S. C. c. 135, s. 24—Arts. 348-350 C. C. P.

See Appeal, 52.

INTERROGATORIES.

Evidence—Faits et Articles—Judicial Admissions—Arts. 221-225 C. C. P.

The constructive admission of a fact resulting from a default to answer interrogatories upon articulated facts recorded under art. 225 C. C. P., cannot be invoked as a judicial admission in a subsequent action of a different nature between the same parties.

Durocher v. *Durocher* .. .. .. xxvii., 363

INTERVENTION.

Right to Intervene—Vagueness and Uncertainty as to Beneficiaries—"Poor Relatives" — "Public Protestant Charities"—Charitable Uses — Persona Designata.

In 1865 J. G. R. a merchant of Quebec, whilst temporarily in New York made a holograph will as follows:—"I hereby will and bequeath all my property, assets or means of any kind to my brother Frank, who will use one-half of them for public Protestant charities in Quebec and Carluke, say the Protestant Hospital Home, the French Canadian Mission, and amongst poor relatives as he may judge best, the other half for himself and for his own use, excepting two thousand pounds which he will send to Miss Mary Frame, Overton Farm.

JAMES G. ROSS."

In an action to have the will declared invalid interventions were filed by Morrin College, an institution where youth are instructed in the higher branches of learning and especially young men intended for the ministry of the Presbyterian Church in Canada, who are entitled to receive a free general and theological education, and are assisted by scholarships and bursaries to complete their education; by the Finlay Asylum, a corporate institution for the relief of the aged and infirm, belonging to the communion of the Church of England; and by W. R. R., a first cousin of the testator claiming as a poor relative.

Held, that Morrin College did not come within the description of a charitable institution according to the ordinary meaning of the words, and had therefore no *locus standi* to intervene; Sedgewick, J., dissenting; that Finlay Asylum came within the terms of the will as one of the charities which F. R. might select as a beneficiary, and this gave it a right to intervene to support the will.

Held, further, that in the gift to "poor relatives" the word "poor" was too vague and uncertain to have any meaning attached to it, and must therefore be rejected, and the word "relatives" should be construed as excluding all except those whom the law, in the case of an intestacy, recognized as the proper class among whom to divide the property of a deceased person, and W. R. R. not coming within that class his intervention should be dismissed.

Held, per Fournier and Taschereau, JJ., that the bequest to "poor relatives" was absolutely null for uncertainty.

Ross v. *Ross* .. .. xxv., 307

INVENTION.

1.—Combination — Old Elements — New and Useful Result—Previous Use.

See Patent of Invention, 1.

2.—Patent—Novelty—Infringement.

See Patent of Invention, 2.

2.—Patent—Manufacture and Sale under—Guarantee—Failure of Patent. Patent.

See Guarantee, 2.

JUDGE.

1.—Collision—Rule of the Road—Opinion of Assessors—Delegation of Judicial Functions.

See Admiralty Law, 1.

2.—Disqualification—Appeal—Quorum in such Case—52 Vic. c. 37. s. 1—Practice.

See Quorum.

3.—Disqualification — Resignation of Judge—Re-hearing of Appeal.

See Practice, 29.

JUDGMENT.

1.—Action—Bar to—Foreign Judgment—Estoppel — Res Judicata — Judgment Obtained After Action Begun—R. S. N. S. (5 ser.) c. 104, s. 12, s.-s. 7; Orders 24 and 70, Rule 2; Order 35, Rule 38.

A judgment of a foreign Court having the force of *res judicata* in the foreign country has the like force in Canada. Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. *The Delta* (1 P. D. 393), distinguished.

The combined effect of orders 24 and 70, Rule 2, and s. 12, s.-s. 7 of c. 104 R. S. N. S. (5 ser.) will permit this to be done in Nova Scotia.

The provision of R. S. N. S. (5 ser.) c. 104, Order 35, Rule 38, that evidence of a judgment recovered in a foreign country shall not be conclusive, in an action on such judgment in Nova Scotia, of its correctness, but that the defendant may defend such suit as fully as if brought for the original cause of action, cannot be invoked in favour of the defendant in Nova Scotia, who has brought an unsuccessful action in a foreign court against the plaintiff.

Law et al. v. *Hansen* .. .. .. xxv., 69

2.—Judgment against Firm—Liability of Reputed Partner—Action on Judgment.

In an action upon a promissory note against M. I. & Co., as makers, and J. I. as indorser, judgment was rendered by default against the firm, and a verdict found in favour of J. I., as it appeared by the evidence that he had indorsed without consideration for the accommodation of the holders, and upon an agreement with them that he should not be held in any manner liable upon the note.

Held, in a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favour, the said agreement meaning that he was not to be liable either as maker or indorser.

Isbester v. *Ray, Street & Co.* .. xxvi., 79

3.—Criminal Code, s. 575—Confiscation of Gaming Instruments, Moneys, Etc.—Action to Recover.

In an action to revendicate moneys seized and confiscated under the provisions of sec. 575 of the Criminal Code.

Held, per Strong, C.J., that a judgment declaring the forfeiture of moneys so seized cannot be collaterally impeached in an action of revendication.

O'Neil v. *The Attorney-General of Canada*, xxvi., 122

4.—Joint Stock Company—Ultra Vires Contract — Consent Judgment on — Action to Set Aside.

A company incorporated for definite purposes has no power to pursue objects other than those expressed in its charter, or such as are reasonably incident thereto, nor to exercise their powers in the attainment of authorized objects in a manner not authorized by the charter. The assent of every shareholder makes no difference.

If a company enters into a transaction which is *ultra vires*, and litigation ensues in the course of which a judgment is entered by consent, such judgment is as binding on parties as one obtained after a contest, and will not be set aside because the transaction was beyond the power of the company.

Charlebois et al. v. *Delap et al.* .. xxvi., 221

5.—Evidence—Admissions — Nullified Instruments.

A will, in favour of the husband of the testatrix, was set aside in an action by the heir-at-law, and declared by the judgment to be *un acte faux*, and therefore to be null and of no effect.

In a subsequent petitory action between the same parties:

Held, Girouard, J., dissenting, that the judgment declaring the will *faux* was not

evidence of admission of the title of the heir-at-law by reason of anything the devisee had done in respect of the will, first, because the will having been annulled was for all purposes unavailable, and secondly, because the declaration of *faux*, contained in the judgment, did not show any such admission.

Durocher v. *Durocher* .. .. .. xxvii., 363

6. — Petition in Revocation — Requete Civile—Concealment of Evidence—Jurisdiction—Art. 1177 C. P. Q.—R. S. C. c. 135, s. 67.

Where judgment on a case in appeal has been rendered by the Supreme Court of Canada and certified to the proper officer of the court of original jurisdiction, the Supreme Court has no jurisdiction to entertain a petition (*requête civile*) for revocation of its judgment, on the ground that the opposite party succeeded through the fraudulent concealment of evidence.

Durocher v. *Durocher* .. .. xxvii., 634

7.—Appeal—Jurisdiction — Reference to Court for Opinion—54 Vic. c. 5 (B. C.) —R. S. C. c. 135, ss. 24 and 28.

The Supreme Court of Canada has no jurisdiction to entertain an appeal from the opinion of a provincial court upon a reference made by the Lieutenant-Governor in Council under a provincial statute, authorizing him to refer to the court for hearing and consideration any matter which he may think fit, although the statute provides that such opinion shall be deemed a judgment of the court.

Union Colliery Company of British Columbia v. *The Attorney-General of British Columbia and Others* xxvii., 637

8.—Public Street — Obstruction—Building "upon" or "close to" Line—Petition for Removal—Variance.

See Practice, 10.

9.—Appeal — Time Limit— Commencement of—Pronouncing or Entry of Judgment—Security—Extension of Time—Order of Judge—Vacation—R. S. C. c. 135, ss. 40, 42, 46.

See Appeal, 49.

10.—Appeal—Time Limit—Commencement of—Pronouncing or Entry of Judgment—Security—Extension of Time—Order of Judge—R. S. C. c. 135, ss. 40, 42, 46.

See Appeal, 50.

11. — Appeal — Interlocutory Order — Final Judgment—Arts. 348-350 C. C. P.—Trial by Jury.

See Appeal, 52.

12.—Rectification of Slight Errors in Judgment—Duty of Appellate Court.

See Appeal, 56.

13.—Opposition to Judgment—Reasons—False Return of Service—Arts. 18, 89 *et seq.*, 483, 489 C. C. P.—Rescisoire and Rescindant.

See Opposition, 1.

14.—Appeal—Jurisdiction—52 Vic. c. 37, s. 2 (D.) — Appointment of Presiding Officers—County Court Judges—55 Vic. c. 48 (Ont.)—57 Vic. c. 51, s. 5 (Ont.)—58 Vic. c. 47 (Ont.)—Statute, Construction of—Appeal from Assessment—Final Judgment—"Court of Last Resort."

See Statute, 34.

15.—Appeal—Jurisdiction—Discretionary Order—Default to Plead—R. S. C. c. 65—Ontario Judicature Act, Rule 135, ss. 24 (*a*) and 27—R. S. O. c. 44, s. 796.

See Appeal, 65.

JUDGMENT OF DISTRIBUTION.

Appeal—Collocation and Distribution—Art. 761 C. C. P.—Hypothecary Claims — Assignment— Notice—Registration—Prete-nom—Arts. 20 and 144 C. C. P.—Action to Annul Deed—Parties in Interest—Incidental Proceedings.

The appeal from judgments of distribution under article 761 of the Code of Civil Procedure is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.

The provisions of article 144 of the Code of Civil Procedure that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidential proceedings upon an appeal in the Court of Queen's Bench.

The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties.

Guertin v. *Gosselin* .. .. .. xxvii., 514

JUDICIAL PROCEEDING.

1.—Appeal — Jurisdiction — Judicial Proceeding — Opposition to Judgment—C. C. P. Arts. 484-493—R. S. C. c. 135, s. 29—Appealable Amount—54 & 55 Vic. c. 25, s. 3, s.-s. 4—Retrospective Legislation.

An opposition filed under the provisions of articles 484 and 487 of the Code of Civil Procedure of Lower Canada, for the purpose of vacating a judgment entered by default, is a "judicial proceeding" within the meaning of sec. 29 of "The Supreme and Exchequer Courts Act," and where the appeal depends upon the amount in controversy, there is an appeal to the Supreme Court of Canada when the amount of principal and interest due at the time of the filing of the opposition under the judgment sought to be annulled, is of the sum or value of $2,000.

Turcotte v. *Dansereau* .. .. .. xxvi., 578

2.—Appeal—Jurisdiction—Amount in Controversy—Opposition Afin de Distraire—Demand in Original Action—R. S. C. c. 135, s. 29.

See Opposition, 2.

JUDICATURE ACT.

(Ontario) — Practice — Added Parties — Orders 46 and 48.

See Practice, 22.

JURISDICTION.

1.—Of Court of Probate—Accounts of Executors and Trustees—Res Judicata.

See Trusts, 3.

2. — Action for Redemption — Foreign Lands — Lex Rei Sitæ — Action in Personam.

See Court, 1.

3.—Action—Jurisdiction to Entertain—Mortgage of Foreign Lands—Action to Set Aside—Secret Trust—Lex Rei Sitæ.

See Lex rei sitæ.

4.—Appeal—Judicial Proceeding—Opposition to Judgment — Appealable Amount—Retrospective Legislation—Arts. 484-493 C. C. P.—R. S. C. c. 135, s. 129—54 & 55 Vic. c. 25, s. 3, s.-s. 4.

See Judicial Proceeding. 1

5.—Appeal—Jurisdiction— Expropriation of Lands — Assessments — Local Improvements—Future Rights—Title to Lands and Tenements—R. S. C. c. 135, s. 29 (*b*)—56 Vic. c. 29, s. 1 (D).

See Appeal, 51.

6.—Appeal—Interlocutory Order—Trial by Jury—Final Judgment—R. S. C. c. 135, s. 24—Arts. 348-350 C. C. P.

See Appeal, 52.

7.—Form of Commitment — Territorial Division—Judicial Notice—R. S. C. c. 135, s. 32.

See Habeas Corpus, 1.

And *see* Appeal.

JURY.

1.—Finding of—Verdict Unwarranted—Promissory Note — Consideration — Accommodation — Discharge — Agreement—New Trial.

The appeal was from a decision of the Supreme Court of New Brunswick, affirming, by an equally divided court, the verdict for defendant at the trial. The action was on a promissory note indorsed by defendant, who pleaded that it was indorsed on the express understanding that he was not to be called upon to pay it, and that he was discharged by the bank subsequently taking security from the makers. At the trial the defendant had a verdict, the jury finding that the bank, on taking security, had agreed that the note in suit should be paid out of the proceeds of collateral held by the bank. On motion, pursuant to leave reserved, for judgment for plaintiffs or a new trial, the Court *en banc* was equally divided, and the verdict stood.

The Supreme Court of Canada, Gwynne, J., dissenting, ordered a new trial, on the ground that the finding of the jury did not warrant the verdict for the defendant.

St. Stephen's Bank v. *Bonness*, 6th May, 1895 .. .. xxiv., 710

2.—Finding on Question of Fact—Interference with on Appeal.

See Master and Servant, 1.

3.—Railway Company—Loan of Cars—Reasonable Care—Breach of Duty—Negligence — Risk Voluntarily Incurred—"Volenti Non Fit Injuria."

See Master and Servant, 5.

4.—Answers to Questions—Railway Co.—Negligence.

See Railways, 12.

5. — Negligence — Question for Jury — Withdrawal of Case from Jury—New Trial.

See Evidence 6.

6.—Evidence — Relevancy — Inferences —Collateral Facts.

See Evidence, 20.

7.—Negligence—Common Fault — Assignment of Facts—Inconsistent Findings—Misdirection.

See New Trial, 2.

8.—Appeal—Interlocutory Order—Trial by Jury—Final Judgment—R. S. C. c. 135, s. 24—Arts. 348-350 C. C. P.

See Appeal, 52.

9. — Accident Insurance — Renewal of Policy — Payment of Premium—Promissory Note — Agent's Authority—Findings.

See Insurance, Accident, 1.

10.—Marine Insurance—Partial Loss on Cargo—Stranding — Evidence — Jury Trial.

See Evidence, 32.

JUSTICE OF THE PEACE.

1.—Jurisdiction—Form of Commitment—Territorial Division — Judicial Notice—R. S. C. c. 135, s. 32.

A warrant of commitment was made by the stipendiary magistrate for the police division of the Municipality of the County of Pictou, in Nova Scotia, upon a conviction for an offence stated therein to have been committed "at Hopewell, in the County of Pictou." The County of Pictou appeared to be of a greater extent than the Municipality of the County of Pictou, there being also four incorporated towns within the county limits—and it did not specifically appear upon the face of the warrant that the place where the offence had been committed was within the Municipality of the County of Pictou. The Nova Scotia Statute of 1895 respecting County Corporations (58 Vic. c. 3, s. 8), contains a schedule which mentions Hopewell as a polling district in Pictou County, entitled to return two councillors to the County Council.

Held, that the court was bound to take judicial notice of the territorial divisions declared by the statute as establishing that the place so mentioned in the warrant was within the territorial extent of the police division.

Held, also, that the jurisdiction of a judge of the Supreme Court of Canada in matters of *habeas corpus* in criminal cases is limited to an inquiry into the cause of imprisonment as disclosed by the warrant of commitment.

Ex parte James W. Macdonald .. xxvii., 683

2.—Game Laws—Game Killed out of Season—Seizure of Furs—Jurisdiction—R. S. Q. Arts. 1405-1409—Writ of Prohibition.

See Prohibition, 1.

JUS PUBLICUM.

1.—Extinction of—44 Vic. c. 1, s. 18 (D.)—Foreshore of Harbour—Right of C. P. R. Co. to use.

See Foreshore.

2.—Public Street—Obstruction—Dedication—Right of Owner or Occupier to Compensation.

See Dedication, 1.

LACHES.

1.—Equity Suit—Specific Performance—Agreement to Convey Land—Possession.

In a suit for specific performance of an agreement by the devisee of land to convey to P., it appeared that the agreement of sale to P. was executed in 1884, and the suit was not instituted until four years later. P. was in possession of the land during the interval.

Held, that as the evidence clearly showed that P. was only in possession as agent of the trustees under the will and caretaker of the land, and as by the terms of the agreement time was to be of the essence of the contract, the delay was a sufficient answer to the suit.

Porter v. *Hale* .. .. xxiii., 265

2.—Trustee—Administrator of Estate—Release by Next of Kin—Recession of Release — Laches — Estoppel — Delays.

See Trusts, 1.

LANDLORD AND TENANT.

1.—R. S. O. (1887) c. 143, s. 28—Construction of Statute—Distress—Goods of Person Holding "Under" Tenant.

The Ontario Landlord and Tenant Act (R. S. O. [1887] c. 343, s. 28), exempts from distress for rent, the property of all persons except the tenant or person liable. The word tenant includes a sub-tenant, assignees of the tenant and any person in actual occupation under or with consent of the tenant.

Held, reversing the judgment of the Court of Appeal, that persons let into possession by a house agent appointed by assignees of a tenant for the sole purpose of exhibiting the premises to prospective lessees, and without authority to let or grant possession of them, were not in occupation "under" the said assignees, and their goods were not liable to distress.

Farwell et al. v. *Jameson* .. xxvi., 588

2.—Loss by Fire—Cause of Fire—Negligence—Civil Responsibility—Legal Presumption—Rebuttal of—Onus of Proof—Hazardous Occupation—Arts. 1053, 1064, 1071, 1626, 1627, 1629 C. C.

To rebut the presumption created by article 1629 of the Civil Code of Lower Canada, it is not necessary for the lessee to prove the exact or probable origin of the fire, or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he has used the premises leased as a prudent administrator (*en bon père de famille*), and that the fire occurred without any fault that could be attributed to him, or to persons for whose acts he should be held responsible.

Judgment of the Court of Queen's Bench for Lower Canada affirmed, Strong, C.J., dissenting.

Murphy v. *Labbè* .. .. .. xxvii., 126

3.—Loss by Fire—Negligence—Local Presumption—Rebuttal of—Onus of Proof—Agreement, Construction of—Covenant to Return Premises in Good Order—Art. 1629 C. C.

A steam sawmill was totally destroyed by fire, during the term of the lease, whilst in the possession, and being occupied by the lessee. The lease contained a covenant by the lessees "to return the mill to the lessor at the close of the season in as good order as could be expected considering wear and tear of the mill and machinery." The lessees, in defence to the lessor's action for damages, adduced evidence to show that necessary and usual precautions had been taken for the safety of the premises, a night-watchman kept there making regular rounds, that buckets filled with water were kept ready, and force-pumps provided for use in the event of fire, and they submitted that as the origin of the fire was mysterious and unknown it should be assumed to have occurred through natural and fortuitous causes, for which they were not responsible. It appeared, however, that the night-watchman had been absent from the part of the mill where the fire was first discovered for a much longer time than was necessary or usual for the making of his rounds, that during his absence the furnaces were left burning without superintendence, that sawdust had been allowed to accumulate for some time in a heated spot close to the furnace where the fire was actually discovered, that on discovering the fire the watchman failed to make use of the water buckets to quench the incipient flames, but lost time in an attempt to raise additional steam pressure to start the force-pumps before giving the alarm.

Held, that the lessee had not shown any lawful justification for their failure to return the mill according to the terms of the covenant; that the presumption established by article 1629 of the Civil Code against the lessees had not been rebutted, and that the evidence showed culpable negligence on the part of the lessees, which rendered them civilly responsible for the loss by fire of the leased premises.

Murphy v. *Labbé* (27 Can. S. C. R. 126), approved and followed.

Klock v. *Lindsay*. *Lindsay* v. *Klock*, xxviii., 453

4.—Rental to Agent for Use of Principals—Possession by Principals—Control of Premises.

See Negligence, 3.

And *see* Lease.

LEASE.

1.—Lease for Lives—Renewal—Insertion of New Life—Evidence of Insertion—Counterpart of Lease—Custody of—Duration of Life—Presumption.

By indenture made in 1805, F. demised certain premises to C., to hold for the lives of the lessee, his brother and his wife, "and renewable forever." The lessee covenanted that on the fall of any of said lives he would, within twelve months, insert a new life and pay a renewal fine, otherwise the right of renewal of the life fallen should be forfeited, and if any question should arise

it would be incumbent on the one interested in the premises to prove the person on whose death the term was made terminable to be alive, or in default such person would be presumed to be dead. In 1884 a purchaser from the assignees of the reversion entered into possession, and in 1890 an action was brought by persons claiming through the lessee to recover possession, and for an account of mesne profits. On the trial a counterpart of the lease, found among the papers of the devisee of the lessor, was received in evidence, upon which was an indorsement dated in 1852, and signed by such devisee, by which a new life was inserted in place of one of the original lives, and receipt of the renewal fine was acknowledged.

Held, affirming the decision of the Supreme Court of Nova Scotia, that the words "renewable forever," in the habendum, taken in conjunction with the lessee's covenant to pay a fine for inserting a new life in place of any that should fall, conferred a right to renewal in perpetuity notwithstanding there was no covenant by the lessor so to renew; that the indorsement was an operative instrument, though found in possession of the owner of the reversion, or at all events it was an admission by their predecessor in title binding on defendants and entitled plaintiffs to a renewal for a new life so inserted, but the right to further renewal was gone, exact compliance with the requirements of the lease in the payment of the fines being essential and the evidence having shown that the original lessee was dead, and the proper assumption being that his brother, the third life, who was a married man in 1805, was also dead in 1884, even if the lease itself had not provided that death would be presumed in default of proof to the contrary.

Held, per Gwynne, J., dissenting, that the term granted was for the joint lives of the three persons named, and ceased upon the falling of any one life without renewal as provided; and the fines not having been paid on the death of the lessee and his brother, there was a forfeiture which entitled defendants to enter.

The person in possession pleaded that he was a purchaser for value without notice and entitled to the benefit of the Registry Act, R. S. N. S. [5 ser.] c. 84.

Held, that the memorandum indorsed on the lease was not a deed within sec. 18 of the Act, nor a lease within s. 25; that if a speculative purchaser having just such an estate as his conveyance gave him, the person in possession would not be within the protection of the Act; and that there was sufficient evidence of notice.

Semble, that section 25 of the Nova Scotia Act, R. S. N. S. [5 ser.] c. 84 applies only to leases for years.

Clinch v. *Pernette* .. .. xxiv., 385

2.—Mines and Minerals — Lease of Mining Areas—Rental Agreement—Payment of Rent—Forfeiture—R. S. N. S. (5 ser.) c. 7—52 Vic. c. 23 (N. S.).

By R. S. N. S. (5 ser.) c. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease, which, however, could only be effected through certain formalities By an amendment in 1889 (52 Vic. c. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by sub-sec. (c), the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment, and "such advance payment shall be construed to commence from the nearest recurring anniversary of the date of the lease." By s. 7 all leases are to contain the provisions of the Act respecting payment of rental, and its refund in certain cases, and by s. 8 said s. 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E. dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, 1891, a rental agreement under the amending Act was executed, under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On May 22nd, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year, and issued a prospecting license to T. for the same areas. E. tendered the year's rent on June 9th, 1894, and an action was afterwards taken by the Attorney-General, on relation of E. to set aside said license as having been illegally and improvidently granted.

Held, affirming the judgment of the Supreme Court of Nova Scotia, in such action, that the phrase "nearest recurring anniversary of the date of the lease" in sub-sec. (c) of sec. 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on June 10th, no rent for 1894 was due on May 22nd of that year, at which date the lease was declared forfeited, and E.'s tender on June 9th was in time. *Attorney-General* v. *Sheraton* (28 N. S. Rep. 492) approved and followed.

Held, further, that though the amending Act provided for forfeiture without prior formalities of a lease in case of non-payment of rent, such provision did not apply to leases

existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of formalities prescribed by the original Act.

Temple v. *The Attorney-General of Nova Scotia* .. .. xxvii., 355

3. — Mortgage — Leasehold Premises — Terms of Mortgage—Assignment or Sub-lease.

A lease of real estate for twenty-one years with a covenant for a like term or terms was mortgaged by the lessee. The mortgage after reciting the terms of the lease, proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be, and form part of the term hereby granted and mortgaged;" the *habendum* of the mortgage was, "To have and to hold unto the said mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease less one day thereof, and all renewals, etc."

Held, reversing the judgment of the Court of Appeal, that the premises of the said mortgage above referred to contained an express assignment of the whole term, and the *habendum*, if intended to reserve a portion to the mortgagor, was repugnant to the said premises, and therefore void; that the words "leasehold premises" were quite sufficient to carry the whole term, the word "premises" not meaning lands or property but referring to the recital which described the lease as one for a term of twenty-one years.

Held, further, that the *habendum* did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term is insufficient to give the instrument the character of a sub-lease.

Jameson v. *The London and Canadian Loan and Agency Company* .. .. .. xxvii., 435

4. — Vendor and Purchaser — Sale of Leased Premises — Termination of Lease—Damages—Art. 1663 C. C.

The Court of Queen's Bench for Lower Canada (Q. R. 7 Q. B. 293), reversed the decision of the trial court, and held;—That the purchaser of real estate to be delivered forthwith could not require the vendor to eject the tenants, the existence of leases being no impediment to immediate delivery of the premises sold, and every sale being subject to existing leases up to the time of the expiration of the current term, and further, that if the purchaser refused to carry out the agreement for sale on the ground of the existence of such leases, he could not have the sale set aside (*resciliée*), with damages against the vendor.

On appeal, the Supreme Court of Canada affirmed the judgment appealed, for the reasons stated in the Court of Queen's Bench, and dismissed the appeal with costs.

Alley v. *The Canada Life Assurance Co.*, 14th June, 1898 .. .. xxviii., 608

5.—Hire of Tug— Conditions — Repairs— Negligence—Compensation.

The company chartered the tug "Beaver" from K., by written contract, dated at Quebec, 22nd May, 1895, in the words following:

"It is agreed between the undersigned that Mr. Kaine charters the tug Beaver for not less than one month from date, at forty-five dollars per day of twenty-four hours. If kept longer than a month the rate of forty dollars per day. Mr. Kaine to furnish tug, crew, provisions, oil, etc., and everything necessary, except coal and pilots above Montreal. The tug to leave here tomorrow morning's tide, the tug to be discharged in Quebec."

The company took possession of the tug; put her in charge of their pilot (who assumed the control, employment and navigation of the vessel), and used the tug for their purposes until 8th July, 1895, when, while still in their possession, the pilot took her, in the daytime, into waters at the foot of the Cornwall Rapids, in the River St. Lawrence, where she struck against some submerged hard substance and sunk. She was raised a few days afterwards, towed to port and placed in dock for repairs at Montreal. The orders were to make the necessary repairs to put the vessel in the same condition as she was immediately before the accident, and on 30th July, K. was notified that the repairs were completed, that the tug would be put out of dock the following day, and he was requested to receive the tug at Montreal. K. answered that the discharge was to be made at Quebec, that she was not in as good condition as when leased, and requested the company to join in a survey, which, however, they declined to do. The survey was made by a naval architect, who reported that, in addition to the repairs

already made, it would cost $2,494.90 to restore the vessel to the same condition as when leased to the company. On 1st August K. took possession of the tug, under protest, and brought the action for the amount of this estimate, in addition to the rent accrued with fees for survey and protest. The company admittew the rent due, and tendered that portion of the claim into court. The Superior Court rendered judgment for the amount of the tender, dismissing the action as to the remainder of the claim, on the ground that K. had been sufficiently compensated by the repairs which had been made by the charterers. The Courts of Review and Queen's Bench increased the verdict to the full sum claimed, $4,909.90, by adding the amount of the surveyors estimate and the fees.

On appeal to the Supreme Court of Canada;—

Held, that the contract between the parties was a contract of lease; that the taking of the vessel, in the daytime, into the waters where she struck was *primâ facie* evidence of negligence on the part of the company, and that as the company did not adduce evidence sufficient to rebut the presumption of fault existing against them, they were responsible, under the Civil Code of Lower Canada, for the damages caused to the vessel during the time it was controlled and used by them.

Held, further, that the proper estimate of damages under the circumstances, is the cost of the repairs which should be assumed to be the measure of the depreciation in value occasioned by the accident, and that no substantial error arose from regarding the condition and value of the vessel at the commencement of the lease as that in which she ought to have been discharged.

Girouard, J., dissented from the majority of the court, and was of opinion that the Superior Court judgment should be restored.

Collins Bay Rafting Co. v. *Kaine*, 14 Dec., 1898 xxix

6.—Dominion License to Cut Timber—Disputed Territory—Implied Covenant—Warranty of Title—Quiet Enjoyment.

See Crown Lands, 1.

7.—Lease of Chattels—Property, Real and Personal—Immovables by Destination — Movables Incorporated with Freehold — Severance from Realty—Contract—Resolutory Condition—Conditional Sale — Hypothecary Creditor—Unpaid Vendor—Arts. 379, 2017, 2083, 2085, 2089, C. C.

See Contract, 30.

And *see* Receipt.

LEGACY.

Will—Bequest of Partnership Business—Acceptance by Legatee—Right of Legatee to an Account.

See Will, 9.

LEGAL MAXIMS.

1.—Res Magis Valeat Quam Pereat—Application—Verba Fortius Accipiuntur Contra Proferentem — Patent Ambiguity.

The intention of the parties to a deed is paramount, and must govern regardless of consequences.

Res magis valeat quam pereat is only a rule to aid in arriving at the intention, and does not authorize the Court to override it.

Where there is an ambiguity on the face of a deed incapable of being explained by extrinsic evidence the maxim *verba fortius accipiuntur contra proferentum* cannot be applied in favour of either party.

Barthel v. *Scotten* .. .. .. xxiv., 367

2.—"Locus Regit Actum"—Lex Domicilii—Lex Rei Sitæ—Holograph Will Executed Abroad—Form of Will.

In 1865 J. G. R., a merchant, then and at the time of his death domiciled in the City of Quebec, whilst temporarily in the City of New York, made the following will in accordance with the law relating to holograph wills in Lower Canada: "I hereby will and bequeath all my property, assets or means of any kind, to my brother Frank, who will use one-half of them for public Protestant charities in Quebec and Carluke, say the Protestant Hospital Home, French Canadian Mission, and amongst poor relatives as he may judge best, the other half to himself and for his own use, excepting $2,000, which he will send to Miss Mary Frame, Overton Farm." A. R. and others, heirs-at-law of the testator, brought action to have the will declared invalid.

Held, Taschereau, J., dissenting, that the will was valid.

Held, further, Fournier and Taschereau, JJ., dissenting, that the rule *locus regit actum* was not in the Province of Quebec, before the Code, nor since under the Code itself (art. 7), imperative, but permissive only.

Held, also, Taschereau, J., dissenting, that the will was valid even if the rule *locus regit*

actum did apply, because it sufficiently appeared from the evidence that by the law of the State of New York the will would be considered good as to movables wherever situated, having been executed according to the law of the testator's domicile, and good as to immovables in the Province of Quebec, having been executed according to the law of the situation of those immovables.

Ross v. *Ross* .. .. xxv., 307

3.—"Volenti Non Fit Injuria"—Reasonable Care—Breach of Duty—Risk Voluntarily Incurred—Negligence.

See Negligence, 27, 28.

And *see* Railway Company, 11.

4.—Omnia Præsumuntur Contra Spoliatorem—Evidence—Presumptions.

See Evidence, 14.

5.—De Minimis Non Curat Lex.

See Canada Temperance Act, 2.

6.—Verba Fortius Accipiuntur Contra Proferentem.

See Municipal Corporation, 20.

7.—Sic Utere Tuo ut Alienum Non Lædas.

See Nuisance, 1.

8.—Qui Jure Suo Utitur Neminem Lædit.

See Nuisance, 1.

9.—In Jure Non Remota Causa Sed Proxima Spectatur.

See Carriers, 2.

10.—Cujus Dare Ejus Est Disponere.

See Composition and Discharge.

11.—Volenti Non Fit Injuria.

See Master and Servant, 7.

12.—Le Rescindant et le Rescissoire Sont Accumulables.

See Opposition, 1.

13.—Usurpateur N'acquiert Que Pied a Pied.

See Arbitration, 3.

LEGISLATION.

Revenue — Customs Duties — Imported Goods — Importation into Canada — Tariff Act — Construction — Retrospective Legislation—R. S. C. c. 32—57 & 58 Vic. c. 33 (D.)—58 & 59 Vic. c. 23 (D.).

By 57 & 58 Vic. c. 33, s. 4, duties are to be levied upon certain specified goods "when such goods are imported into Canada." *Held*, reversing the judgment of the Exchequer Court, King and Girouard, JJ., dissenting, that the importation as defined by sec. 150 of the Customs Act, (R. S. C. c. 32), is not complete until the vessel containing the goods arrives at the port at which they are to be landed.

Section 4 of the Tariff Act, 1895 (58 & 59 Vic. c. 23), provided that "this Act shall be held to have come into force on the 3rd of May in the present year, 1895." It was not assented to until July.

Held, that goods imported into Canada on May 4th, 1895, were subject to duty under said Act.

The Queen v. *The Canada Sugar Refining Co.*, xxvii., 395

(Affirmed on appeal to Privy Council, see (1898) A. C. 735).

LEGISLATURE.

1.—Constitutional Law—British North America Act, ss. 65, 92—Act Respecting the Executive Administration of the Laws of the Province—Provincial Penal Legislation.

The Local Legislatures have the right and power to impose punishments by fine and imprisonment as sanctions for laws which they have power to enact. B. N. A. Act, s. 92, s.-s. 15.

Attorney-General of Canada v. *Attorney-General of Ontario* .. .. xxiii., 458

2.—Power to Repeal Previous Acts—Rights in Relation to Education—Manitoba Constitutional Act—Appeal from Act or Decision.

See Constitutional Law, 3.

3.— Powers — Sale of Liquor — Prohibition—53 Vic. c. 56, s. 18 (O.)—54 Vic. c. 46 (O.)—Local Option.

See Constitutional Law, 7.

4.— Powers — Prohibitory Laws — Sale of Liquor — Local Option — Canada Temperance Act.

See Constitutional Law, 8.

5.—Constitutional Law — Powers of Executive Councillors—"Letter of Credit"—Ratification by Legislature—Obligations Binding on the Province—Discretion of Government as to Expenditures — Petition of Right — Negotiable Instrument — "Bills of Exchange Act, 1890"—"The Bank Act," R. S. C. c. 120.

See Constitutional Law, 11.

6.—Constitutional Law—Marital Rights—Married Woman—Separate Estate—Jurisdiction of North-west Territorial Legislature—Statute, Interpretation of—40 Vic. c. 7, s. 3, and Amendments—R. S. C. c. 50—N. W. Ter. Ord. No. 16 of 1889.

See Constitutional Law, 16.

7.—Canadian Waters—Property in Beds — Public Harbours — Erections in Navigable Waters — Interference with Navigation—Rights of Fishing—Power to Grant — Riparian Proprietors — Great Lakes and Navigable Rivers—Operation of Magna Charta — Provincial Legislation —R. S. O. (1887) c. 24, s. 47—55 Vic. c. 10, ss. 5 to 13, 19 and 21 (O.)—R. S. Q. Arts 1375 to 1378.

See Constitutional Law, 17.

LESSOR AND LESSEE.

1.—Crown Lands—Abitration and Award—Use and Occupation—Action for Possession—Condition Precedent.

The appeal was from a decision of the Court of Appeal for Ontario affirming the judgment of the Queen's Bench Division, which had dismissed the appellant's action. The Algoma Trading Co., one of the appellants and plaintiffs, leased certain Crown lands to the respondent Shea, the lease containing a covenant by Shea not to remove gravel or sand from the premises. Shea afterwards ascertained that no patent for the land had been issued to the company, and applied to the Crown Lands Department for a patent thereof to himself, and also sold gravel off the premises to the Canadian Pacific Railway Co. The Algoma Trading Co. then pressed the claim they had previously made to the Department and the Commissioner of Crown Lands ruled that it should issue to them on payment to Shea for his improvements. Shea refusing to agree to any terms of compensation the company served him with a notice of arbitration, and an award was eventually made which was not taken up as Shea refused to pay his share of the arbitrators' fees. The Algoma Trading Co. having assigned their patent to the plaintiff Boulton, an action was brought by him and the company against Shea claiming arrears of rent, payment for use and occupation, damages for breach of the covenant not to remove gravel and delivery of possession.

The Supreme Court, Gwynne, J., dissenting, affirmed the decision of the Court of Appeal that plaintiffs were not in a position to bring the action until Shea had been paid for his improvements.

Boulton v. *Shea*, 13th March, 1893, xxii., 742

2.—Water Lots—Filling in—"Buildings and Erections"—"Improvements."

The lessor of a water lot who had made crib-work thereon filled it in with earth to the level of adjoining dry lands, and thereby made the property available for the construction of sheds and warehouses, claimed compensation for the work so done under a proviso in the lease by the lessor to pay for "buildings and erections" upon the leased premises at the end of the term.

Held, affirming the judgment of the Court of Appeal, that the crib-work and earth-filling were not "buildings and erections" within the meaning of the proviso.

Adamson v. *Rogers* .. .. .. xxvi., 159

LEX DOMICILII.

Will, Form of — Holograph Will Executed Abroad — Quebec Civil Code, Art. 7—Locus Regit Actum—Lex Rei Sitæ.

See Will, 8.

LEX REI SITAE.

1.—Action—Jurisdiction to Entertain—Mortgage of Foreign Lands—Action to Set Aside—Secret Trust.

A Canadian Court cannot entertain an action to set aside a mortgage on foreign lands on the ground that it was taken in pursuance of a fraudulent scheme to defraud creditors of the original owner through whom the mortgagee claimed title, it not being alleged in the action, and the Court not being able to assume, that the law of the foreign country in which the lands were situate corresponded to the statutory law of the province in which the action was brought. *Burns* v. *Davidson* (21 O. R. 547), approved and followed.

Purdom v. *Pavey & Co.* .. .. xxvi., 412

2.—Form of Will — Holograph Will Executed Abroad — Art. 7 C. C. Locus Regit Actum—Lex Domicilii.

See Will, 8.

LIBEL.

1. — Slander — Privileged Statements — Public Interest — Charging Corruption Against Political Candidate —Justification—Challenge to Sue— Costs.

See Costs, 3.

2.—Master and Servant—Hiring of Personal Services—Municipal Corporation — Appointment of Officers — Summary Dismissal—Libellous Resolution—Statute, Interpretation of— Difference in Text of English and French Versions — 52 Vic. c. 79, s. 79 (Q.) — "A Discretion" — "At Pleasure."

See Master and Servant, 8.

LICENSE.

1.—Constitutional Law—Powers of Provincial Legislatures—Direct Taxation — Manufacturing and Trading Licenses — Distribution of Taxes — Uniformity of Taxation — Quebec Statutes 55 & 56 Vic. c. 10 and 56 Vic. c. 15—British North America Act, 1867.

The provisions of the Quebec Statute 55 & 56 Vic. c. 10, as amended by 56 Vic. c. 15, do not involve a regulation of trade and commerce, and the license fee thereby imposed is a direct tax and *intra vires* of the legislature; the license required to be taken out by the statute is merely an incident to the collection of the tax and does not alter its character.

Where a tax has been imposed by competent legislative authority, the want of uniformity or equality in the apportionment of the tax is not a ground sufficient to justify the Courts in declaring it unconstitutional. *Bank of Toronto* v. *Lambe* (12 App. Cas. 575), followed. *Attorney-General* v. *The Queen Insurance Co.* (3 App. Cas. 1090), distinguished.

Fortier v. *Lambe* .. .. xxv., 422

2.—License to Sell Lands—Nova Scotia Probate Act—R. S. N. S. [5 ser] c. 100; 51 Vic. (N. S.) c. 26—Executors and Administrators — Estoppel — Res Judicata.

An executrix obtained from the Probate Court a license to sell real estate of a deceased testator for the payment of his debts. Judgment creditors of the devisees moved to set aside the license, but failed on their motion, and again in appeal. The lands were sold under the license and the executrix paid part of the price to the judgment creditors, and they received the same knowing the moneys to have been proceeds of the sale of the lands. Afterwards the judgment creditors, still claiming the license to be null, issued execution against the lands, and the purchaser brought an action to have it declared that the judgment was not a charge thereon.

Held, that the judgment upon the motion to set aside the license was conclusive against the judgment creditors, and they were precluded thereby from taking collateral proceedings to charge the lands affected, upon grounds invoked or which might have been invoked upon the motion.

Held, further, that the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the license as having been regularly issued, and were estopped from attacking its validity in answer to the action.

Clark et al. v. *Phinney* .. .. .. xxv., 633

3.—License to Street Railway Car— Payment for Horse-car—By-law—Tax on Working Horses.

See Assessment, 4.

4.—License to Cut Timber—Disputed Territory—Dominion License — Orders-in Council—Warranty of Title—Breach of Contract.

See Crown Lands, 1.

5.—Sale of Liquor—Charter of City— Cumulative Taxes — Special Tax — Validity of By-law.

See Municipal Corporation, 12.

6.—License to Enter Lands—Trespass— Damages — Easement — Equitable Interest—Municipal By-law—Notice.

See Municipal Corporation, 21.

7.—Constitutional Law—Municipal Corporation — Powers of Legislature— License — Monopoly — Highways and Ferries—Tolls—Ferry— Disturbance of Licensee—Club Associations, Companies and Partnerships—North-west Territories Act, R. S. C. c. 50, ss. 15 and 24—B. N. A. Act, s. 92, s.s. 8, 10 and 15—Rev. Ord. N. W. T. (1888) c. 28 —N. W. Ter. Ord. No. 7 of 1891-92, s. 4.

See Municipal Corporation, 26.

LIEUTENANT-GOVERNOR.

REPRESENTATIVE OF THE QUEEN—PROVINCIAL GOVERNMENT.

The Lieutenant-Governor of a province is as much the representative of Her Majesty the Queen for all purposes of Provincial Government as the Governor-General himself is for all purposes of the Dominion Government.

Attorney-General of Canada v. *Attorney-General of Ontario* .. .. xxiii., 458

And *see* Constitutional Law, 6 and 14.

LIFE ESTATE.

WILL, CONSTRUCTION OF—DEATH WITHOUT ISSUE—EXECUTORY DEVISE OVER—CONDITIONAL FEE—ESTATE TAIL.

See Will, 12.

LIFE INSURANCE.

See Insurance, Life.

LIMITATION OF ACTIONS.

1.—EASEMENT—NECESSARY WAY — IMPLIED GRANT—USER—OBSTRUCTION OF WAY—INTERRUPTION OF PRESCRIPTION—ACQUIESCENCE—R. S. N. S. (5 SER.) C. 112—R. S. N. S. (4 SER.) C. 100—2 & 3 WM. IV. (IMP.) C. 71, SS. 2 & 4.

K. owned lands in the County of Lunenburg, N. S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road for hauling fuel from his wood lot to his residence, at the other end of the property. It appeared that though the three parcels fronted upon a public highway, this was the only practical means plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood-lot to the highway. There was not any formed road across the lands, but merely a track upon the snow, during the winter months, and the way was not used at any other season of the year. This user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed, and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff. The statute (R. S. N. S. 5 ser. c. 112), provides a limitation of twenty years for the acquisition of easements, and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same.

Held, that notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute.

Held, also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would, without special grant, pass by implication upon the severance of the tenements.

Knock v. *Knock* .. .. .. xxvii., 664

2.—SEIGNORIAL TENURE—CHARGES RUNNING WITH THE TITLE—SERVITUDE—EDITS ET ORDONNANCES (L. C.).

See Servitude, 2.

3.—TITLE TO LANDS—SHERIFF'S DEED—NULLITY—EQUIVOCAL POSSESSION.

See Evidence, 30.

LIQUOR LAWS.

1.—SALE OF LIQUOR—PROHIBITION—SALE BY RETAIL—POWERS OF LEGISLATURE.

See Constitutional Law, 7.

2.—SALE OF LIQUOR—PROHIBITORY LAWS—POWERS OF LEGISLATURE—LOCAL OPTION—CANADA TEMPERANCE ACT.

See Constitutional Law, 8.

LITIGIOUS RIGHTS.

TITLE TO LANDS—USURPER IN POSSESSION—PLEADINGS—ART. 1582 C. C.

Where there is no litigation pending or dispute of title to lands raised except by a defendant who has usurped possession, and holds by force, he cannot when sued set up against the plaintiff a defence based upon a purchase of litigious rights.

Powell v. *Watters* .. .. xxviii., 133

LOCAL IMPROVEMENTS.

1.—MUNICIPAL CORPORATION—PAVEMENTS—ASSESSMENT OF OWNERS—DOUBLE TAXATION—24 VIC. (N. S.) C. 39—53 VIC. (N. S.) C. 60, S. 14.

See Highway, 2.

2.—MUNICIPAL CORPORATION—BY-LAW—ASSESSMENT—LOCAL IMPROVEMENTS—AGREEMENT WITH OWNERS OF PROPERTY—CONSTRUCTION OF SUBWAY—BENEFIT TO LANDS.

See Municipal Corporation, 28.

LORD CAMPBELL'S ACT.

ACTION BY WIDOW UNDER—PREVIOUS ACTION BY DECEASED IN HIS LIFETIME—DIFFERENT CAUSES OF ACTION—IDENTITY OF MATERIAL ISSUES—EVIDENCE IN FIRST ACTION—SUBSEQUENT USE OF.

See Evidence, 3.

MACHINERY.

See Immovable Property.
" Movables.

MAGISTRATE.

CANADA TEMPERANCE ACT—SEARCH WARRANT—MAGISTRATE'S JURISDICTION—CONSTABLE—JUSTIFICATION OF MINISTERIAL OFFICER—GOODS IN CUSTODIA LEGIS—REPLEVIN—ESTOPPEL—RES JUDICATA—JUDGMENT INTER PARTES.

See Canada Temperance Act, 2.

And *see* Justice of the Peace.

MAGNA CHARTA.

CANADIAN WATERS—PROPERTY IN BEDS—PUBLIC HARBOURS—ERECTIONS IN NAVIGABLE WATERS—INTERFERENCE WITH NAVIGATION—RIGHT OF FISHING—POWER TO GRANT—RIPARIAN PROPRIETORS—GREAT LAKES AND NAVIGABLE RIVERS—OPERATION OF MAGNA CHARTA—PROVINCIAL LEGISLATION—R. S. O. (1887) c. 24, s. 47—55 VIC. 10, s.s. 5 TO 13, 19 AND 21 (O.)—R. S. Q. ARTS. 1375 TO 1378.

Where the provisions of Magna Charta are not in force, as in the Province of Quebec, the Crown in right of the province may grant exclusive rights of fishing in tidal waters, except in tidal public harbours, in which, as in public harbours, the Crown in right of the Dominion, may grant the beds and fishing rights. Gwynne, J., dissenting.

Per Strong, C.J., and King and Girouard, JJ.—The provisions of Magna Charta relating to tidal waters would be in force in the provinces (except Quebec), unless repealed by legislation, but such legislation has probably been passed by the various Provincial Legislatures and these provisions of the Charter, so far as they affect public harbours, have been repealed by Dominion legislation.

In re Jurisdiction over Provincial Fisheries, xxvi., 444

MAINTENANCE.

WILL—SHERIFF'S DEED—PROOF OF HEIRSHIP—REJECTION OF EVIDENCE—NEW TRIAL.

See Evidence, 27.

MALICIOUS PROSECUTION.

PROBABLE CAUSE—FORGERY.

S., being a holder of a promissory note indorsed to him by the payees, sued to recover the amount, but his action was dismissed upon evidence that it had never been signed by the person whose name appeared as maker, nor with his knowledge or consent, but had been signed by his son without his authority. The son's evidence on the trial of the suit was to the effect that he never intended to sign the note, and if he had actually signed it with his father's name, it was because he believed that it was merely a receipt for goods delivered by express. Immediately after the dismissal of the suit, S. wrote to the payees asking them if they would give him any information which would help him in laying a criminal charge in order to force payment of the note and costs. He also applied to the express company's agent, by whom the goods were delivered, and the note procured, and was informed that there was a receipt for the goods in the delivery-book, but that the signature was denied and could not be proved. However, without further inquiry, and notwithstanding the warning of a mutual friend against taking criminal proceeding, S. laid information against the son for forgery. The Police Magistrate at Montreal, upon the investigation of the charge, declared it to be unfounded and discharged the prisoner.

Held, reversing the judgments of both courts below, that, under the circumstances, the prosecution was without reasonable or probable cause, and the plaintiff was entitled to substantial damages.

Charlebois v. *Surveyer* .. .. xxvii., 556

MANDAMUS.

1.—SCHOOL CORPORATION—DECISION OF SUPERINTENDENT OF PUBLIC INSTRUCTION—APPEAL—FINAL JUDGMENT—PRACTICE—R. S. Q. ARTS. 2055, 2056—55 & 56 VIC. c. 24, ss. 18 AND 19 (QUE.).

Under the provisions of article 2055 of the Revised Statutes of Quebec, as amended

by 55 & 56 Vic. c. 24, ss. 18 and 19, certain ratepayers of a school district appealed to the Superintendent of Public Instruction for the Province of Quebec, who thereupon rendered a decision and gave orders and directions respecting the erection of a school house, which, however, the School Commissioners neglected to perform.

Held, affirming the judgment appealed from, that in such cases, the decision of the Superintendent of Public Instruction was final; that no appeal therefrom would lie to the Superior Court, and that the proper remedy to enforce the execution of the orders and directions of the Superintendent was by mandamus.

Les Commissaires d'Ecole de St. Charles v. *Cordeau et al.*, 9th December, 1895.

2.—Appeal—Jurisdiction—Court of—Review—54 & 55 Vic. c. 25, s. 3 (D.)—Costs.

See Appeal, 33.

3—Contract, Construction of—Statute, Construction of—12 Vic. c. 183, s 20—Contract, Notice to Cancel—Gas Supply Shut off for Non-payment of Gas Bill on Other Premises.

See Contract, 38.

MANDATE.

1.—Termination of—Partnership Moneys—Sequestration of—Contre-lettre.

In November, 1886, G. B. by means of a *contre-lettre* became interested in certain real estate transactions in the City of Montreal, effected by one P. S. M. In December, 1886, G. B. brought an action against P. S. M., to have a sale made by the latter to one Barsalou declared fraudulent, and the new purchaser restrained from paying the balance due to the parties named in the deed of sale. A plea of compensation was filed and pending the action a sequestrator was appointed, to whom Barsalou paid over the money. In September, 1887, another action was instituted by G. B. against P. S. M., asking for an account of the different real estate transactions they had conformably to the terms of the *contre-lettre*. To this action a plea of compensation was also filed. The Superior Court dismissed the first action on the ground that G. B. had no right of action, but maintained the second action ordering an account to be taken. The action ordering an account to be taken. The Court of Queen's Bench affirmed the judgment of the Superior Court, dismissing the first action and P. S. M. acquiesced in the judgment of the Superior Court on the second action.

On appeal to the Supreme Court of Canada, from the judgment of the Court of Queen's Bench, dismissing the first action:

Held, reversing the judgment of the court below, that the plea of compensation was unfounded, G. B. having the right to put an end to P. S. M.'s mandate by a direct action, and therefore until the account which had been ordered in the second action had been rendered, the moneys should remain in the hands of the sequestrator appointed with the consent of the parties.

Bury v. *Murphy* .. .. xxii., 137

2.—Partnership — Division of Assets — Art. 1898 C. C.—Debtor and Creditor Account.

In the Province of Quebec, where there is no other arrangement between the partners, the partition of the property of a commercial partnership must be made according to the rules laid down in the Civil Code in relation to the partition of successions, in so far as they can be made to apply.

Upon the dissolution of a partnership, where one of the partners has been entrusted with the collection of moneys due as the mandatary of the others, any of his co-partners may bring suit against him directly either for an account under the mandate, or as for money had and received.

Lefebvre v. *Aubry* .. .. xxvi., 602

MANITOBA,

Constitutional Act—Legislation in Respect to Education — Legislative Powers—Right to Repeal—Appeal to Governor-General in Council — 33 Vic. c. 3, s. 22, s.-s. 2—B. N. A. Act, s. 93, s.-s. 3.

See Constitutional Law, 3.

MARINE INSURANCE.

See Insurance, Marine.

MARITIME LAW.

1.—Deviation—Putting into Port Overnight—Stress of Weather.

On appeal from a judgment of the Supreme Court of Nova Scotia (24 N. S. Rep. 205), which held that it was not a deviation for a coasting vessel on a voyage from Mahome Bay, N. S., to Fortune Bay in Newfoundland, and thence, etc., to put into an intermediate port over night to escape

threatened bad weather, the Supreme Court of Canada affirmed the decision of the court appealed from, and dismissed the appeal with costs.

The Nova Scotia Marine Insurance Co. v. *Eisenhauer et al.*, 6th November, 1894.

2.—COLLISION—NEGLIGENCE—RULE OF THE ROAD — STEAMER — SAILING VESSEL — OPINION OF ASSESSORS—DELEGATION OF JUDICIAL FUNCTIONS.

The action was for damages by a collision on the Bay of Quinté between plaintiff's schooner and a steamer belonging to defendant. In the marine protest by the captain of the schooner the cause of the action was alleged to be that the steamer's wheel was put to port when it should have been put to starboard, just before the collision. The action was twice tried, the first trial having been set aside on the ground that the Judge, by adopting the opinion of assessors, had delegated his judicial functions (19 Ont. App. R. 298). The second trial resulted in a verdict for plaintiff, which was affirmed by the Court of Appeal for Ontario.

The Supreme Court of Canada affirmed the judgment of the Court of Appeal, sustaining plaintiff's verdict, and dismissed the appeal with costs.

Collier v. *Wright*, 6th May, 1895, xxiv., 714

3.—COLLISION—RULES OF THE ROAD—NARROW CHANNEL—NAVIGATION, RULES OF—R. S. C. c. 79, s. 2, ARTS. 15, 16, 18, 19, 21, 22 AND 23—"CROSSING" SHIPS—"MEETING" SHIPS—"PASSING" SHIPS—BREACH OF RULES—PRESUMPTION OF FAULT — CONTRIBUTORY NEGLIGENCE — MOIETY OF DAMAGES—36 & 37 VIC. (IMP.) C. 85, S. 17—MANŒUVRES IN "AGONY OF COLLISION."

If two vessels approach each other in the position of "passing" ships, (with a side light of one dead ahead of the other) where unless the course of one or both is changed, they will go clear of each other, no statutory rule is imposed, but they are governed by the rules of good seamanship.

If one of two "passing" ships acts consistently with good seamanship, and the other persists, without good reason, in keeping on the wrong side of the channel; in starboarding her helm when it was seen that the helm of the other was hard to port, and the vessels are rapidly approaching; and, after signalling that she was going to port, in reversing her engines and thereby turning her bow to starboard, she is to blame for a collision which follows.

The non-observance of the statutory rule (art. 18), that steamships shall slacken speed, or stop, or reverse, if necessary when approaching another ship, so as to involve risk of collision, is not to be considered as a fact contributing to a collision, provided the same could have been avoided by the impinging vessel by reasonable care exerted up to the time of the accident.

Excusable manœuvres executed in "agony of collision" brought about by another vessel, cannot be imputed as contributory negligence on the part of the vessel collided with.

The rule that in narrow channels steamships shall, when safe and practicable, keep to the starboard (art. 21), does not override the general rules of navigation. *The Leverington* (11 P. D. 117), followed.

The "Cuba" v. *McMillan* .. .. xxvi., 651

4.—AFFREIGHTMENT—CARRIERS— CHARTER-PARTY—PRIVITY OF CONTRACT—NEGLIGENCE — STOWAGE — FRAGILE GOODS — BILL OF LADING—CONDITION—NOTICE—ARTS. 1674, 1675, 1676 C. C.—CONTRACT AGAINST LIABILITY FOR FAULT OF SERVANTS—ARTS. 2383 (8); 2390, 2409; 2413, 2424 2427 C. C.

The chartering of a ship with its company for a particular voyage by a transportation company, does not relieve the owners and master from liability upon contracts of affreightment during such voyage where the exclusive control and navigation of the ship are left with the master, mariners and other servants of the owners, and the contract had been made with them only.

The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse shipowners from liability for damages caused through improper or insufficient stowage.

A condition of a bill of lading, providing that the shipowners shall not be liable for negligence on the part of the master or mariners, or their other servants, or agents, is not contrary to public policy, nor prohibited by law in the Province of Quebec.

Where a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur, whether from negligence, rough handling or any other cause whatever, and that the owners were to be "exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding and all other accidents

of navigation, even though the damage or loss from these may be attributable to some wrongful act, fault, neglect, or error in judgment of the pilot, master, mariners, or other servants of the shipowners; nor for breakage or any other damage arising from the nature of the goods shipped," such provisions apply only to loss or damage resulting from acts done during the carriage of the goods, and do not cover damages caused by neglect or improper stowage prior to the commencement of the voyage.

The Glengoil Steamship Company v. *Pilkington.*

The Glengoil Steamship Company v. *Ferguson*, xxviii., 146

5.—Collision at Sea — Negligence—Defective Steering Gear—Question of Fact—Interference with Decision of Local Judge in Admiralty.

See Appeal, 19.

6. — Foreign Vessel Fishing within British Waters of Canada—Three-Mile Limit—License—R. S. C. c. 94, s. 3—Evidence—Onus Probandi.

See Fisheries, 3.

MARRIAGE.

Conditions in Restraint of—"Dying Without Issue"—"Revert"—Contingencies—Annuity—Dower — Election by Widow—Devolution of Estates Act, 49 Vic. (O.) c. 22—"The Wills Act of Ontario," R. S. O. (1889) c. 109, s. 30.

See Will, 10.

MARRIAGE SETTLEMENT.

Don Mutuel—Property Excluded from, but Acquired After Marriage — Resiliation for Value.

Where by the terms of a *don mutuel* by marriage contract a farm in the possession of one of the sons of the husband under a deed of donation was excluded from the *don mutuel*, and subsequently the farm in question became the absolute property of the father, the deed of donation having been resiliated for value, it was held that by reason of the resiliation the husband had acquired an independent title to the farm, and it thereby became charged for the amount due under the *don mutuel* by marriage contract, viz., $5,000, and that after the husband's death the wife (the respondent in this case) was entitled, until a proper inventory had been made of the deceased's estate, to retain possession of the farm. Taschereau and Gwynne, JJ., dissenting.

Martindale v. *Powers* .. .. .. xxiii., 597

MARRIED WOMAN.

1.—Dissolution of Partnership—Benefit Conferred During Marriage—Simulation—Fraud.

On 10th April, 1886, J. S. M., a retired partner of the firm of McL. & B., composed of himself and W. M., his brother, agreed to leave his capital, for which he was paid interest, in the new firm to be constituted of the said W. M. and one R., an employee of the former firm, and that such capital should rank after the creditors of the old firm had been paid in full. The new firm was to carry on business under the same firm name up to 31st December, 1889. J. S. M. died on 18th November, 1886. His wife, separate as to property, had an account in the books of both firms. On 16th April, 1890, an agreement was entered into between the new firm and the estate of J. S. M. and his widow, by which a large balance was admitted to be due by them to the estate and the widow. The new firm was declared insolvent in January, 1891. Claims were filed by the widow, and the estate of J. S. M. against the insolvents, and the Merchants Bank of Canada contested them on the grounds, *inter alia*, that they had been creditors of the firm and continued to advance to the new firm on the faith of the agreement of April, 1886, that the widow's moneys formed part of the capital of J. S. M., and that the dissolution was simulated. (Q. R. 2 Q. B. 431).

The Supreme Court of Canada reversed the judgment of the Court of Queen's Bench, for Lower Canada (appeal side), and restored the judgment of the Superior Court, District of Montreal, Fournier and King, JJ., dissenting, and

Held, that the dissolution of the partnership was simulated; that the moneys which appeared to be owing to the widow, after having credited her with her own separate moneys, were in reality moneys deposited by her husband in order to confer upon her, during marriage, benefits contrary to law, and that the bank had a sufficient interest to contest these claims, the transaction being in fraud of their rights as creditors.

The Merchants Bank of Canada v. *McLachlan.*
The Merchants Bank of Canada v. *McLaren*, 2nd April, 1894 .. .. xxiii., 143

2.—Constitutional Law—Marital Rights—Married Woman—Separate Estate—Jurisdiction of North-west Territorial Legislature—Statute—Interpretation of—40 Vic. c. 7, s. 3 and Amendments—R. S. C. c. 50—N. W. Ter. Ord. No. 16 of 1889.

The provisions of Ordinance No. 16 of 1889, respecting the personal property of married women, are *intra vires* of the Legislature of the North-West Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorized to legislate by the order of the Governor-General in Council passed under the provisions of "The North-West Territories Act."

The provisions of said Ordinance No. 16 are not inconsistent with sections 36 to 40 inclusively of "The North-West Territories Act," which exempt from liability for her husband's debts the personal earnings and business profits of a married woman.

The words "her personal property" used in the said Ordinance No. 16 are unconfined by any context, and must be interpreted not as having reference only to the "personal earnings" mentioned in s. 36, but to all the personal property belonging to a woman, married subsequently to the Ordinance, as well as to all personal property acquired since then by women married before it was enacted. *Brittlebank* v. *Gray-Jones* (5 Man. L. R. 33), distinguished.

Conger v. *Kennedy* .. .. .. xxvi., 397

3.—Mortgage — Implied Covenant — Disclaimer.

Where a deed of lands to a married woman, but which she did not sign, contained a recital that, as part of the consideration, the grantee should assume and pay off a mortgage debt thereon, and a covenant to the same effect with the vendor, his executors, administrators and assigns, and she took possession of the lands and enjoyed the same, and the benefits thereunder without disclaiming or taking steps to free herself from the burthen of the title, it must be considered that in assenting to take under the deed she bound herself to the performance of the obligations therein stated to have been undertaken upon her behalf, and an assignee of the covenant could enforce it against her separate estate.

Small v. *Thompson* .. .. .. xxviii., 219

4. — Separate Property — Conveyance — Contracts—C. S. N. B. c. 72.

Section 1 of C. S. N. B. c. 72, which provides that the property of a married woman shall vest in her as her separate property, free from the control of her husband and not liable for payment of his debts, does not, except in the case specially provided for, enlarge her power for disposing of such property, or allow her to enter into contracts which at common law would be void.

Moore v. *Jackson* (22 Can. S. C. R. 310), referred to. *Lea* v. *Wallace et al.* (33 N. B. Rep. 492), reversed.

Wallace et al. v. *Lea* .. .. .. xxviii., 595

5.—Estoppel — Conveyance by Married Woman—Agreement—Recital — Bona Fides.

See Fraudulent Conveyances.

MASTER AND SERVANT.

1. — Common Employment — Negligence — Questions of Fact—Finding of Jury on.

A gas company, engaged in laying a main in a public street, procured from a plumber the services of H., one of his workmen, for such work, and while engaged thereon H. was injured by the negligence of the servants of the company.

In an action for damages for such injury:

Held, affirming the decision of the Supreme Court of New Brunswick, that by the evidence at the trial negligence against the company was sufficiently proved.

Held, further, that whether or not there was a common employment between H. and the servant of the company was a question of fact, and it having been negatived by the finding of the jury, and the evidence warranting such finding, an appellate court would not interfere.

St. John Gas Light Co. v. *Hatfield*, xxiii., 164

2.—Contract—Proprietor of Newspaper—Engagement of Editor—Dismissal—Breach of Contract.

A. B. and C. B. who had published a newspaper as partners or joint owners, entered into a new agreement, by which A. B. assumed payment of all the debts of the business and became from that time sole proprietor of the paper, binding himself to continue its publication, and, in case he wished to sell out, to give C. B. the preference. The agreement provided that: "3. Le dit Charles Bélanger devient, à partir de ce jour, directeur et rédacteur du dit journal, son nom devant paraitre comme directeur en tête du dit journal, et pour ses services et son influence comme tel, le dit Arthur

Bélanger lui alloue quatre cents piastres par année, tant par impressions, annonces, etc., qu'en argent jusqu'au montant de cette somme, et le dit Arthur Bélanger ne pourra mettre fin à cet engagement sans le consentement du dit Charles Bélanger." The paper was published for some time under this agreement as a supporter of the Liberal party, when C. B., without instructions from or permission of A. B., wrote editorials violently opposing the candidate of that party at an election, and was dismissed from his position on the paper. He then brought an action against A. B. to have it declared that he was "*rédacteur et directeur*" of the newspaper and claiming damages.

Held, reversing the decision of the Court of Queen's Bench, that C. B., by the agreement, had become the employee of A. B., the owner of the paper; that he had no right to change the political colour of the paper without the owner's consent; and that he was rightly dismissed for so doing.

Bélanger v. *Bélanger* .. .. .. xxiv., 678

3.—Negligence of Servant — Deviation from Employment — Resumption—Contributory Negligence — Infant — Evidence.

A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work and in doing so ran over and injured a child.

Held, affirming the decision of the Supreme Court of New Brunswick, that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to his master's store and made a fresh start.

Merritt v. *Hepenstal* .. .. .. xxv., 150

4.—Tortious Act — Public Work — Contractor—Liability of Railway Company.

A company building a railway is not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place, and in a manner, not authorized by the contract.

Kerr v. *The Atlantic and N. W. Ry. Co.*, xxv., 197

5.—Railway Company—Loan of Cars—Reasonable Care—Breach of Duty—Negligence — Risk Voluntarily Incurred—"Volenti Non Fit Injuria."

A lumber company had railway sidings laid in their yard for convenience in shipping lumber over the line of railway, with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway company thereupon sending their locomotive and crew to the respective sidings in the lumber yard and bringing away the cars to be despatched from their depot as directed by the bills of lading.

Held, that in the absence of any special agreement to such effect, the railway company's servants while so engaged were not the employees of the lumber company, and that the railway company remain liable for the conduct of the persons in charge of the locomotive used in the moving of the cars; and that where the lumber company's employees remained in a car lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using reasonable skill and care in moving the car with them in it, so as to avoid all risk and injury to them.

The Canada Atlantic Railway Company v. *Hurdman* .. .. xxv., 205

6.—Principal and Agent — Master and Servant — Insurance Agent — Duty — Appointment—Acting for Rival Company—Divided Interests—Dismissal.

To act as agent for a rival insurance company is a breach of an insurance agent's agreement "to fulfil conscientiously all the duties assigned to him, and to act constantly for the best interests of (his employer)," and is sufficient justification for his dismissal.

Judgment of the Court of Appeal for Ontario (22 Ont. App. R. 408), affirmed.

Eastmure v. *The Canada Accident Assurance Co.*, 22nd February, 1896 .. .. xxv., 691

7.—Negligence—"Quebec Factories Act" R. S. Q. Arts. 3019-3053—C. C. Art. 1053—Civil Responsibility—Accident, Cause of — Conjecture — Evidence — Onus of Proof—Statutable Duty, Breach of—Police Regulations.

The plaintiff's husband was accidentally killed whilst employed as engineer in charge of the defendant's engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial and left the manner in which the accident occurred a matter of conjecture.

Held, that, in order to maintain the action it was necessary to prove by direct evidence or by weighty, precise and consistent presumptions arising from the facts proved, that the accident was actually caused by the

positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed.

The provisions of "The Quebec Factories Act," (R. S. Q. arts. 3019 to 3053, inclusively), are intended to operate only as police regulations, and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees, as provided by the Civil Code.

The Montreal Rolling Mills Co. v. *Corcoran*, xxvi., 595

8.—HIRING OF PERSONAL SERVICES—MUNICIPAL CORPORATION — APPOINTMENT OF OFFICERS — SUMMARY DISMISSAL — LIBELLOUS RESOLUTION — STATUTE, INTERPRETATION OF—DIFFERENCE IN TEXT OF ENGLISH AND FRENCH VERSIONS—52 VIC. C. 79, S. 79 (Q.)—"A DISCRETION" —"AT PLEASURE."

The charter of the City of Montreal, 1889, 52 Vic. c. 79, section 79, gives power to the City Council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "*à sa discrétion*," while the English version has the words "*at its pleasure*.'

Held, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment, and the City Council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal.

Davis v. *City of Montreal* .. .. xxvii., 539

9.—NEGLIGENCE — INJURIES SUSTAINED BY SERVANT — RESPONSIBILITY — CONTRIBUTORY NEGLIGENCE — PROTECTION OF MACHINERY.

Where an employee sustains injuries in a factory through coming in contact with machinery, the employer, although he may be in default, cannot be held responsible in damages, unless it is shown that the accident by which the injuries were caused was directly due to his neglect.

Tooke v. *Begeron* .. .. xxvii., 567

10.—NEGLIGENCE — ACCIDENT, CAUSE OF — CONTRIBUTORY NEGLIGENCE—EVIDENCE.

In an action for damages by an employee for injuries sustained while operating an embossing and stamping press, it appeared that when the accident causing the injury occurred, the whole of the employee's hand was under the press, which was unnecessary, as only the hand as far as the second knuckle needed to be inserted for the purpose of the operation in which he was engaged. It was alleged that the press was working at undue speed, but it was proved that the speed had been increased to that extent at the instance of the employee himself, who was a skilled workman.

Held, reversing the judgment of the Court of Queen's Bench, that the injury occurred by a mere accident not due to any negligence of the employer, but solely to the heedlessness and thoughtlessness of the injured man himself, and the employer was not liable.

Burland v. *Lee* .. .. xxviii., 348

11.—MASTER AND SERVANT—NEGLIGENCE — EVIDENCE—PROBABLE CAUSE OF ACCIDENT.

Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no direct fault or negligence proved against the defendant, and the actual cause of the accident is purely a matter of speculation or conjecture.

The Canada Paint Co. v. *Trainor*, xxviii., 352

12.—NEGLIGENCE—FAULT OF FELLOW SERVANT — EMPLOYER'S LIABILITY — ARTS. 1053, 1056 C. C.

The defendants carried on the manufacture of detonating cartridges or caps made by charging copper shells with a composition of fulminate of mercury and chlorate of potash, a highly explosive mixture, requiring great care in manipulation. It is, when dry, liable to explode easily by friction or contact with flame, but has the property of burning slowly without exploding when saturated with moisture. It was the duty of defendants' foreman, twice a day, to provide a sufficient quantity of the mixture for use in his special compartment during the morning and in the afternoon, and to keep it properly dampened with water, for which purpose he was furnished with a sprinkler. It was also the foreman's duty to fill the empty shells with the fulminating mixture as they were handed to him set on end in wooden plates, and then pass them on, properly moistened, through a slot in his compartment, to a shelf whence they were removed by another employee and the charges

pressed down to the bottom of the shells by means of a pressing machine worked by C., at a table near by. An explosion took place which appeared from the evidence to have originated at the pressing machine, and might have occurred either through the fulminate in the shells having been allowed to become too dry from carelessness in sprinkling, or from an accumulation of the mixture adhering to and drying upon the metal portions of the pressing machine. It was the duty of C., the person operating the pressing machine, to keep it clean and prevent the mixture from accumulating and drying there in dangerous quantities. When the explosion occurred, the foreman and C. and another employee were killed, but a fourth employee, who was blown outside the wreck of the building and survived, stated that the first flash appeared to come from the pressing machine, and the explosion followed immediately. The theory propounded by the plaintiff, the father of C., assumed that nothing was known of the actual cause of the explosion, nor where it in point of fact originated, but inferred from a supposed condition of things, that the fulminate had not been sufficiently dampened, and, that this indicated carelessness on the part of the foreman, and raised a presumption that the explosion originated through his fault. The evidence of the survivor led to the conclusion that the explosion originated through C.'s neglect to clean the pressing machine. There was evidence to show that the defendants had taken all reasonable precautions to diminish risk of injury to their employees in the event of an explosion, and that conformity with rules prescribed and instructions given by them to their employees for the purpose of securing their safety, would be sufficient to secure them from injury.

Held, Taschereau and King, JJ., dissenting, that as it appeared under the circumstances of the case, that the cause of the accident was either unknown or else that it could fairly be presumed to have been caused by the negligence of the person injured, whose personal representative brought the action, that there could not be any such fault imputed to the defendants as would render them liable in damages.

Dominion Cartridge Co. v. *Cairns*, xxviii., 361

(Leave to appeal was refused by the Privy Council).

13.—Contract of Hiring—Duration of Service—Evidence—Dismissal—Notice.

Where no time is limited for the duration of a contract of hiring and service, whether or not the hiring is to be considered as one for a year is a question of fact to be decided upon the circumstances of the case.

A business having been sold, the foreman, who was engaged for a year, was retained in his position by the purchaser. On the expiration of his term of service no change was made, and he continued for a month longer at the same salary, but was then informed that if he desired to remain his salary would be considerably reduced. Having refused to accept the reduced salary he was dismissed, and brought an action for damages claiming that his retention for the month was a re-engagement for another year on the same terms.

Held, affirming the judgment of the Court of Appeal (24 Ont. App. R. 296), which reversed that of Meredith, C.J., at the trial, (27 O. R. 369), that as it appeared the foreman knew that the business, before the sale, had been losing money and could not be kept going without reductions of expenses and salaries, that he had been informed that the contracts with the employees had not been assumed by the purchaser and that upon his own evidence there was no hiring for any definite period, but merely a temporary arrangment, until the purchaser should have time to consider the changes to be made, the foreman had no claim for damages, and his action was rightly dismissed.

Bain v. *Anderson & Co., et al.* .. xxviii., 481

14.—Negligence — Employer's Liability — Concurrent Findings of Fact—Contributory Negligence.

In an action by an employee to recover damages for injuries sustained, there was some evidence of neglect on the part of the employers which, in the opinion of both courts below, might have been the cause of the accident through which the injuries were sustained, and both courts found that the accident was due to the fault of the defendants either in neglecting to cover a dangerous part of a revolving shaft temporarily with boards, or to disconnect the shaft or stop the whole machinery while the plaintiff was required to work over or near the shaft.

Held, Taschereau, J., dissenting, that although the evidence on which the courts below based their findings of fact might appear weak, and there might be room for the inference that the primary cause of the injuries might have been the plaintiff's own imprudence, the Supreme Court of Canada would not, on appeal, reverse any such concurrent findings of fact.

The George Matthews Co. v. *Bouchard*, xxviii., 580

15.—Workman in Factory — Accident—Negligence of Master—Evidence.

See Negligence, 9.

16.—Public Work—Negligence of Servants of Crown—Common Employment—Law of Quebec.

See Negligence, 11.

17.—Workman in Factory—Use of Dangerous Machinery — Orders of Superior—Reasonable Care.

See Negligence, 15.

18.—Negligence — Employer's Liability——Evidence—New Trial—Imprudence.

See Negligence, 16.

19.—Negligence — Defective Machinery—Evidence for Jury.

See Evidence, 24.

20.—Negligence — Common Fault — Inconsistent Findings—New Trial.

See Negligence, 29.

MERGER.

Mortgage—Leasehold Estate — Assignment of Equity of Redemption—Acquisition of Reversion by Assignee—Priority.

The assignee of a term, who takes the assignment subject to a mortgage and afterwards acquires the reversion, cannot levy out of the mortgaged premises, to the prejudice of the mortgagees, the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee. *Emmett* v. *Quinn*, (7 Ont. App. R. 306), distinguished.

Judgment of the Court of Appeal (24 Ont. App. R. 599), affirmed.

Mackenzie v. *Building & Loan Association*, xxviii., 407

(Leave to appeal was refused by the Privy Council).

MINES AND MINERALS.

1. — Lease of Mining Areas — Rental Agreement—Payment of Rent—Forfeiture—R. S. N. S. (5 ser.) c. 7—52 Vic. c. 23 (N. S.).

By R. S. N. S. (5 ser.) c. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease, which, however, could only be effected through certain formalities. By an amendment in 1889 (52 Vic. c. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by sub-sec. (*c*), the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment, and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By s. 7 all leases are to contain the provisions of the Act respecting payment of rental and its refund in certain cases, and by s. 8, said s. 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E. dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, 1891, a rental agreement under the amending Act was executed, under which E. paid the rent for his mining areas for three years, the last payment being in May 1893. On May 22nd, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year, and issued a prospecting license to T. for the same areas. E. tendered the year's rent on June 9th, 1894, and an action was afterwards taken by the Attorney-General, on relation of E., to set aside said license as having been illegally and improvidently granted.

Held, affirming the judgment of the Supreme Court of Nova Scotia in such action, that the phrase "nearest recurring anniversary of the date of the lease" in sub-sec. (*c*) of sec. 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on June 10th, no rent for 1894 was due on May 22nd of that year at which date the lease was declared forfeited, and E.'s tender on June 9th was in time. *Attorney-General* v. *Sheraton* (28 N. S. Rep. 492), approved and followed.

Held, further, that though the amending Act provided for forfeiture without prior formalities of a lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of the formalities prescribed by the original Act.

Temple v. *Attorney-General of Nova Scotia*, xxvii., 355

2.—Sale of Phosphate Mining Rights—Option to Purchase other Minerals Found While Working—Exercise of Option.

See Contract, 15.

3.—Crown Grant—Reservation of Coal—Order-in-Council — Supplementary Grant.

See Crown Lands, 2.

4.—Mortgage—Registration—Fixtures — Interpretation of Terms—Bill of Sale—Personal Chattels—Delivery—R. S. N. S. (5 ser.) c. 92, s.s. 1, 4 and 10 (Bills of Sale)—55 Vic. (N. S.) c. 1, s. 143 (The Mines Act)—41 & 42 Vic. (N. S.) c. 31, s. 4.

See Mortgage, 7.

MINOR.

Universal Legatee—Succession—Acceptance by, after Action—Operation of.

See Succession, 1.

MISREPRESENTATION.

See Conditions and Warranties.
" Insurance, Accident, Fire, Life, and Marine.

MISTAKE.

Vendor and Purchaser—Principal and Agent—Mistake—Contract — Agreement for Sale of Land—Agent Exceeding Authority—Findings of Fact.

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

Murray v. *Jenkins* .. .. .. xxviii., 565

MONEY PAYMENT.

Insolvency—Assignment — Preference—Payment in Money—Cheque of Third Party—R. S. O. (1887) c. 124, s. 3.

See Insolvency, 3.

MONOPOLY.

1.—Construction of Statute—By-law—Exclusive Rights — Statute Confirming—Extension of Privilege—C. S. C. c. 65—45 Vic. (Q.) c. 79, s. 5,

See Statute, 23.

2.—Constitutional Law—Municipal Corporation—Powers of Legislature—License—Monopoly — Highways and Ferries — Navigable Streams — By-laws and Resolutions — Intermunicipal Ferry—Tolls—Disturbance of Licensee — North-west Territories Act, R. S. C. c. 50, ss. 13 and 24—B. N. A. Act, s. 92, s.s. 8, 10 and 16—Rev. Ord. N. W. Ter. (1888) c. 28—Ord. N. W. T. No. 7 of 1891-92, s. 4—Companies, Club Associations and Partnerships.

See Constitutional Law, 14.

MORTGAGE.

1.—Practice—Parties to Action—Trespass to Mortgaged Property—First and Subsequent Mortgages—Owner of Equity of Redemption—Transfer of Interest before Action.

Under the Nova Scotia Judicature Act the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold, though after the trespass and before action brought he has parted with his equity. Gwynne, J., dissenting.

Mortgagees out of possession cannot, after their interest has ceased to exist, maintain an action for such trespass—and injury committed while they held the title.

Per Gwynne, J. A mortgagee in possession at the time the trespass and injury is committed is the only person damnified thereby, and can maintain an action therefor after he has parted with his interest, nor is he estopped therefrom by having consented to a sale to one of the trespassers of the personal property as to which the trespass was committed.

The tort feasors could not set up such estoppel even though the amount recovered from them with the sum received by such mortgagee for his interest should exceed his mortgage debt.

Brookfield v. *Brown* .. .. xxii., 398

2.—Sale of Land—Sale Subject to Mortgage—Indemnity of Vendor—Special Agreement—Purchaser Trustee for Third Party.

L. F. agreed in writing to sell land to C. F. and others subject to mortgages thereon,

C. F. to hold same in trust to pay half the proceeds to L. F. and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated, and L. F. became a member receiving stock as part of the consideration for his transfer. C. F. filed a declaration that he held the property in trust for the company, but gave no formal conveyance. An action having been brought against L. F. to recover interest due on a mortgage against the property C. F. was bought in as third party to indemnify L. F., his vendor, against a judgment in said action.

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau and King, JJ., dissenting, that the evidence showed that the sale was not to C. F. as a purchaser on his own behalf but for the company and the company and not C. F. was liable to indemnify the vendor.

Fraser v. *Fairbanks* .. .. .. xxiii., 79

3. — Mortgage — Discharge — Action on Promissory Note — Security for Mortgage Debt.

A. and B., partners in business, borrowed money from C. giving him as security their joint and several promissory note and a mortgage on partnership property. The partnership having been dissolved, A. assumed all the liabilities of the firm and continued to carry on the business alone. After the dissolution C. gave A. a discharge of the mortgage, but without receiving payment of his debt, and afterwards brought an action against B. on the promissory note.

Held, affirming the decision of the Court of Appeal, that the note having been given for the mortgage debt, C. could not recover without being prepared, upon payment, to convey to B. the mortgaged lands which he had incapacitated himself from doing.

Held, also, that by the terms of the dissolution of partnership the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change his release of the principal, A., discharged B., the surety, from the liability for the debt.

Allison v. *McDonald* .. .. .. xxiii., 635

4.—Mortgage of Trust Estate—Equity Running with Estate—Equitable Recourse—Construction of Deed—Description of Lands—Falsa Demonstratio—Water Lots—Accretion to Lands—After Acquired Title—Contribution to Redeem—Discharge of Mortgage — Parol Evidence to Explain Deed—Estoppel by Deed.

On the dissolution of the firm of A. & Co. by the retirement of C. D. A., the business was carried on by the remaining partners T. A. and B. A. on the same premises, which were the property of C. D. A., the continuing partners agreeing to pay off a mortgage thereon as one of the old firm's debts. They neglected to pay and the property was sold by the sheriff under a foreclosure decree, when they purchased and took a deed describing the lands as in said mortgage, one side being bounded by "the windings of the shore" of Sydney Harbour, and including a "water lot," part of which was known as the "Stone ballast heap," in front of the shore lands. They immediately re-mortgaged the lands by the same description adding a further or alternative description, and, at the end, the following words:—"Also all and singular the water lots and docks in front of the said lots," —although in fact they then owned none except those covered by the description in the deed from the sheriff, and they gave at the same time a collateral bond to the mortgagees for the amount of their mortgage. They then conveyed the equity to C. D. A., giving him a bond of indemnity against the mortgage they had so executed. Some time afterwards T. A. and B. A. acquired by grant certain other water lots in front of the mortgaged property, and used and occupied them as part of their business premises along with the mortgaged lands. C. D. A. sold the equity of redemption subject to the mortgage, and T. A. and B. A. settled their obligation under the indemnity bond by a compromise with the assignees of C. D. A., paying $8,000, and obtained their discharge.

Upon proceedings being taken by the assignees of the mortagagees to foreclose the mortgage, and against T. A. and B. A. upon the collateral bond, T. A. and B. A. paid the amount due, and the foreclosure proceedings were continued for their benefit.

Held, that the liability of the mortgagors was fully satisfied and discharged by the compromise, and as they were afterwards obliged to pay the outstanding encumbrance they were entitled to take an assignment and enforce the mortgage by foreclosure proceedings against the lands. Per Gwynne, J.—The mortgagors were only entitled t

foreclosure for the realization of the amount actually paid by them in compromising their liability under the indemnity bond.

Held, further, that as the construction of the mortgage depended upon the state of the property at the time it was made parol evidence would be admitted to explain the ambiguity in the description of the lands intended to be effected; that as there was no specific descriptions or recitals tending to show that any other property was intended to be covered by the mortgage beyond what would be satisfied by including the water lot described as the "Stone ballast heap," the after-acquired water lots would not be charged or liable to contribute ratably towards redemption of the mortgage; that even admitting that the description was sufficient to include the after-acquired property, such property was not liable to contribute towards payment of the mortgage debt.

Imrie v. *Archibald et al.* .. .. xxv., 368

5.—Agreement to Charge Lands—Statute of Frauds—Registry.

The owner of an equity of redemption in mortgaged lands, called the Christopher farm, signed a memorandum as follows:—"I agree to charge the east half of Lot No. 19, in the seventh concession of Loughborough, with the payment of two mortgages held by G. M. G. and Mrs. R. respectively, upon the Christopher farm * * * amounting to $750 * * * and I agree on demand to execute proper mortgages of said land to carry out this agreement, or to pay off the said Christopher mortgages."

Held, affirming the judgment of the Court of Appeal, that this instrument created a present equitable charge upon the east half of Lot 19, in favour of the mortgagees named therein.

Rooker v. *Hoofstetter* .. .. .. xxvi., 41

6.—Chattel Mortgage — Mortgagee in Possession—Negligence—Sale under Powers—"Slaughter Sale."

A mortgagee in possession who sells the mortgaged goods in a reckless and improvident manner is liable to account not only for what he actually receives, but for what he might have obtained for the goods had he acted with a proper regard for the interests of the mortgagor.

Rennie v. *Block et al.* .. .. .. xxvi., 356

7.—Mining Machinery — Registration — Fixtures—Interpretation of Terms—Bill of Sale—Personal Chattels—R. S. N. S. (5 ser.) c. 92, ss. 1, 4 and 10 (Bills of Sale)—55 Vic. (N. S.) c. 1, s. 143 (The Mines Act)—41 & 42 Vic. (N. S.) c. 31, s. 4.

The "fixtures" included in the meaning of the expression "Personal Chattels" by the tenth section of the Nova Scotia "Bills of Sale Act," are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act.

An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia "Bills of Sale Act" (R. S. N. S. 5 ser. c. 92), and there is no distinction, in this respect, between fixtures covered by a licensee's or tenant's mortgage, and those covered by a mortgage made by the owner of the fee.

Warner v. *Don et al.*, ... xxvi., 388

8.—Mortgage Loan to Pay off Prior Encumbrances — Increased Rate of Interest—Assignment of Mortgage—Purchaser of Equity of Redemption—Accounts.

When a loan is effected for the purpose of paying off encumbrances, at once or as they become due, at the option of the new mortgagees, and one of the encumbrances at a lower rate of interest than the new mortgage is not due, and the prior mortgagee refuses to accept pre-payment, the new mortgagee cannot treat that mortgage as paid off, and charge the mortgagor with interest at the increased rate on the amount thereof, unless he has set apart the amount of the prior encumbrance and notified the mortgagor to that effect, but must, until the prior mortgage is fully paid, charge interest at the increased rate only on the amount actually paid to the prior mortgagees.

An assignee of a mortgage takes it subject to the actual state of the accounts between the mortgagor and mortgagee, and cannot, even where it contains a formal receipt for the whole mortgage money, claim more in respect of it than has been advanced, and cannot, in such a case as the present, charge the mortgagor with the increased rate.

The fact that the purchaser of the equity of redemption has been allowed the full amount of the mortgage as between the

mortgagor and himself does not make him liable to pay that sum to the mortgagees.

Judgment of the Court of Appeal for Ontario (23 Ont. App. R. 139), a irmed.

London Loan Co. v. *Manley*, 20th May, 1896, xxvi., 443

9.—Leasehold Premises—Terms of Mortgage—Assignment or Sub-lease.

A lease of real estate for twenty-one years with a covenant for a like term or terms was mortgaged by the lessee. The mortgage after reciting the terms of the lease proceeded to convey to the mortgagee the indenture and the benefit of all covenants and agreements therein, the leased property by description and "all and singular the engines and boilers which now are or shall at any time hereafter be brought and placed upon or affixed to the said premises, all of which said engines and boilers are hereby declared to be and form part of the said leasehold premises hereby granted and mortgaged or intended so to be and form part of the term hereby granted and mortgaged;" the *habendum* of the mortgage was: "To have and to hold unto the said mortgagees, their successors and assigns, for the residue yet to come and unexpired of the term of years created by the said lease less one day thereof and all renewals, etc."

Held, reversing the judgment of the Court of Appeal, that the premises of the said mortgage above referred to contained an express assignment of the whole term, and the *habendum*, if intended to reserve a portion to the mortgagor, was repugnant to the said premises and therefore void; that the words "leasehold premises" was quite sufficient to carry the whole term, the word "premises" not meaning lands or property, but referring to the recital which described the lease as one for a term of twenty-one years.

Held, further, that the *habendum* did not reserve a reversion to the mortgagor; that the reversion of a day generally without stating it to be the last day of the term is insufficient to give the instrument the character of a sub-lease.

Jameson v. *The London and Canadian Loan and Agency Company* .. .. .. xxvii., 435

10.—Leasehold Estate—Assignment of Equity of Redemption—Acquisition of Reversion by Assignee — Priority — Merger.

The assignee of a term, who takes the assignment subject to a mortgage and afterwards acquired the reversion, cannot levy out of the mortgaged premises, to the prejudice of the mortgagees, the ground rent reserved by the lease which he was himself under an obligation to pay before becoming owner of the fee. *Emmett* v. *Quinn* (7 Ont. App. R. 306), distinguished.

Judgment of the Court of Appeal (24 Ont. App. R. 599) affirmed.

Mackenzie v. *Building & Loan Association*, xxviii., 407

(Leave to appeal to Privy Council refused).

11. — Appeal — Jurisdiction — Matter in Controversy — Interest of Second Mortgagee — Surplus and Sale of Mortgaged Lands—60 & 61 Vic. c. 34, s. 1 (D.)—Statute, Construction of—Practice.

While an action to set aside a second mortgage on lands for $2,200 was pending, the mortgaged lands were sold under a prior mortgage, and the first mortgagee, after satisfying his own claims, paid the whole surplus of the proceeds of the sale, amounting to $270, to the defendant as subsequent incumbrancer. Judgment was afterwards rendered declaring the second mortgage void, and ordering the defendant to pay the plaintiff, as assignee for the benefit of creditors, the $270 so received by him thereunder, and this judgment was affirmed on appeal.

Upon an application to allow an appeal bond, on further appeal to the Supreme Court of Canada, objections were taken for want of jurisdiction under the clauses of the Act, 60 & 61 Vic. c. 34, but they were overruled by a Judge of the Court of Appeal for Ontario, who held that an interest in real estate was in question and the appeal was accordingly proceeded with, and the appeal case and factums printed and delivered.

On motion to quash for want of jurisdiction when the appeal was called for hearing;

Held, that the case did not involve a question of title to real estate or any interest therein, but as was merely a controversy in relation to an amount less than the sum or value of one thousand dollars, and that the Act, 60 & 61 Vic. c. 34, prohibited an appeal to the Supreme Court of Canada.

Jermyn v. *Tew* .. .. xxviii., 497

12.—Title to Land—Entail—Life Estate—Fiduciary Substitution—Privileges and Hypothecs—Mortgage by Institute—Preferred Claim — Prior Incumbrancer—Vis Major—16 Vic. c. 25—Registry Laws—Practice—Sheriff's

SALE—CHOSE JUGEE — PARTIES—ESTOPPEL—SHERIFF'S DEED—DEED POLL—IMPROVEMENTS ON SUBSTITUTED PROPERTY —GROSSES REPERATIONS—ART. 2172 C. C.—29 VIC. c. 26 (CAN.).

The institute, *grevé de substitution*, in possession of land and curator to the substitution, upon judicial authority, mortgaged the land under the provisions of the Act for the relief of sufferers by the great Montreal Fire of 1852 (16 Vic. c. 25), for a loan which was expended in reconstructing buildings upon the property. On default in payment the mortgagee obtained judgment against the institute, and caused the lands to be sold in execution by the sheriff in a suit to which the curator had not been made a party.

Held, that, as the mortgage had been judicially authorized and was given special preference by the statute, superior to any rights or interests that might arise under the substitution, the sale by the sheriff in execution of the judgment so recovered discharged the lands from the substitution not yet open and effectually passed the title to the purchaser for the whole estate, including that of the substitute as well as that of the *grevé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution against the said lands.

An institute, *grevé de substitution*, may validly affect and bind the interest of the substitute in real estate subject to a fiduciary substitution in a case where the bulk of the property has been destroyed by *vis major* in order to make necessary and extensive repairs (*grosses reparations*), upon obtaining judicial authorization, and in such case the substitution is charged with the cost of the *grosses reparations*, the judicial authorization operates as *res judicata*, and the substitute called to the substitution is estopped from contestation of the necessity and expense of the repairs.

The sheriff seized and sold lands under a writ of execution against a defendant, described therein, and in the process of seizure, and also in the deed by him to the purchaser, as *grevé de substitution*.

Held, that the term used was merely descriptive of the defendant and did not limit the estate seized, sold or conveyed under the execution.

Held, further, per Taschereau, J., that article 2172 of the Civil Code of Lower Canada, as interpreted by the statute, 29 Vic. c. 26 (Can.), applies to hypothecs and charges only, and does not require renewal of registration for the preservation of rights in and titles to real estate.

Judgment of the Court of Queen's Bench affirmed, Taschereau and King, JJ., dissenting.

Chef dit Vadeboncœur v. *City of Montreal*, 13th Oct., 1898 .. .. xxix.

13—ASSIGNMENT OF EQUITY—COVENANT OF INDEMNITY—ASSIGNMENT OF COVENANT—RIGHT OF MORTGAGEE ON COVENANT IN MORTGAGE.

C. executed a mortgage on his lands in favour of B., with the usual covenant for payment. He afterwards sold the equity of redemption to D. who covenanted to pay off the mortgage and indemnify C. against all costs and damages in connection therewith. This covenant of D. was assigned to the mortgagee. D. then sold the lands, subject to the mortgage, in three parcels, each of the purchasers, assuming payment of his proportion of the mortgage debt, and he assigned the three respective covenants to the mortgagee who agreed not to make any claim for the said mortgage money against D. until he had exhausted his remedies against the said purchasers and against the lands. The mortgagee having brought an action against C. on his covenant in the mortgagee.

Held, reversing the judgment of the Court of Appeal (24 Ont. App. R. 492), that the mortgagee being the sole owner of the covenant of D. with the mortgagor, assigned to him as collateral security, had so dealt with it as to divest himself of power to restore it to the mortgagor unimpaired, and the extent to which it was impaired could only be determined by exhaustion of the remedies provided for in the agreement between the mortgagee and D. The mortgagee, therefore, had no present right of action on the covenant in the mortgage.

McCuaig v. *Barber*, 21st Nov., 1888, xxix.

13*a*.— CORPORATION — BY-LAW — BONUS TO MORTGAGORS — CONDITIONS OF — CONSTRUCTION OF TERMS.

See By-law, 1.

14.—FORECLOSURE OF—ORDER FOR POSSESSION—DEFENCE TO—ILLEGAL OR IMMORAL CONSIDERATION—PURCHASER OF EQUITY OF REDEMPTION—RIGHT TO SET UP DEFENCE.

See Practice, 7.

15.—CHATTEL MORTGAGE — AFFIDAVIT OF BONA FIDES—COMPLIANCE WITH STATUTORY FORM—R. S. N. S. 5 SER. c. 92, s. 4.

See Chattel Mortgage, 1.

16.—Action for Redemption — Foreign Lands — Lex Rei Sitæ — Action in Personam—Jurisdiction of Court.

See Court, 1.

17.—Suretyship—Appropriation of Payments—Reference to Take Accounts.

See Principal and Surety, 1.

18.—Jurisdiction to set Aside Mortgage on Foreign Lands—Secret Trust—Lex Rei Sitæ.

See Lex rei sitæ, 1.

19.—Property, Real and Personal—Immovables by Destination — Movables Incorporated with Freehold—Severance from Realty—Contract—Resolutory Condition—Conditional Sale — Hypothecary Creditor — Unpaid Vendor—C. C. Arts. 379, 2017, 2083, 2085, 2089.

See Contract, 30.

20.—Construction of—Trade Fixtures—Chattels—Tools and Machinery of a "Going Concern" — Constructive Annexation.

See Immovable Property, 2.

21.—Implied Covenant—Married Woman —Disclaimer.

See Deed, 11.

22.—Obligation to Indemnify Grantor Against Mortgage—Conveyance Subject to Mortgage — Assignment of Right of Action—Principal and Surety—Implied Covenant.

See Action, 16.

23.—Title to Land—Sheriff's Sale—Deed—Action to Vacate—Petition—Exposure to Eviction—Actio Condictio Indebiti—Refund of Price Paid —Substitution not yet Open—Prior Incumbrance—Arts. 706, 710, 714, 715, C. C. P.—Arts. 1511, 1535, 1586, 1591, 2060, C. C.

See Substitution, 3.

MOVABLES.

1.—Vendor and Purchaser—Unpaid Vendor — Conditional Sale — Suspensive Condition — Movables Incorporated with Freehold—Immovables by Destination — Hypothecary Charges — Arts. 375 *et seq.*, C. C.

A suspensive condition in an agreement for the sale of movables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid condition.

In order to give movable property the character of immovables by destination, it is necessary that the person incorporating the movables with the immovable should be, at the time, owner both of the movables and of the real property with which they are so incorporated. *Lainé* v. *Béland* (26 Can. S. C. R. 419), and *Filiatrault* v. *Goldie* (Q. R. 2 Q. B. 368), distinguished.

Decision of the Court of Queen's Bench affirmed, Girouard, J., dissenting.

La Banque d'Hochelaga v. *The Waterous Engine Works Co.* .. .. xxvii., 406

2.—Property, Real and Personal—Immovables by Destination—Movables Incorporated with Freehold—Severance from Realty—Contract—Resolutory Condition—Conditional Sale — Hypothecary Creditor — Unpaid Vendor—C. C. Arts. 379, 2017, 2083, 2085, 2089.

See Contract, 30.

MUNICIPAL CORPORATION.

1.—Local Improvement—Notice to Ratepayers—By-law—Variance from Notice—R. S. O. (1887) c. 184, s. 622.

On a proposal for the construction of a stone road-way as a local improvement on one of its streets, the Corporation of the City of Toronto notified the owners of property to be affected thereby, as required by the Municipal Act, R. S. O. (1887), c. 184, s. 622, s.-s. 2, of the intention to construct such local improvement, describing it as a "macadam roadway" and that payment of the cost should be assessed specially on the properties benefited payable "in five and twenty" equal annual payments. In the by-law passed for its construction the work was described as "a macadam and granite set roadway and stone curbing," and the cost was to be paid in five years. On an application to quash the by-law it was not shown that the work as described in the by-law was identical with that mentioned in the notice.

Held, affirming the decision of the Court of Appeal for Ontario (19 Ont. App. R. 713), that the by-law was invalid on account of the variances from the notice, and that it had been properly quashed.

The City of Toronto v. *Gillespie*, 1st May, 1893.

2.—By-law—Street Railway — Construction Beyond Limits of Municipality—Validating Act—Construction of.

The corporation of the Town of Port Arthur passed a by-law entitled "a by-law to raise the sum of $75,000 for street railway purposes, and to authorize the issue of debentures therefor, which recited, *inter alia*, that it was necessary to raise said sum for the purpose of building, etc., a street railway connecting the Municipality of Neebing with the business centre of Port Arthur. At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the ratepayers and passed, but none was submitted ordering the construction of the work. Subsequently an Act was passed by the Legislature of Ontario in respect to the said by-law, which enacted that the same "is hereby confirmed and declared to be valid, legal and binding on the town * * * and for all purposes, etc., relating to or affecting the said by-law, and any and all amendments of the Municipal Act * * * * shall be deemed and taken as having been complied with."

Held, reversing the decision of the Court of Appeal, Taschereau, J., dissenting, that the said Act did not dispense with the requirements of ss. 504 and 505 of the Municipal Act requiring a by-law providing for construction of the railway to be passed, but only confirmed the one that was passed as a money by-law.

Held, also, that an erroneous recital in the preamble to the Act that the Town Council had passed a construction by-law had no effect on the question to be decided.

Dwyer v. *Town of Port Arthur* .. xxii., 241

3.—Municipal Corporation—Ownership of Roads and Streets—Rights of Private Property Owners — Ownership ad Medium Filum Viæ—R. S. N. S. [5 ser.] c. 45—50 Vic. c. 23 (N. S.).

That the ownership of lands adjoining a highway extends *ad medium filum viæ* is a presumption of law only which may be rebutted, but the presumption will arise though the lands are described in a conveyance as bounded by or on the highway. Gwynne, J., contra.

In construing an Act of Parliament the title may be referred to in order to ascertain the intention of the legislature.

The Act of the Nova Scotia Legislature, 50 Vic. c. 23, vesting the title to highways and the lands over which the same pass in the Crown for a public highway, does not apply to the City of Halifax.

The Charter of the Nova Scotia Telephone Company authorizing the construction and working of lines of telephone along the sides of, and across and under, any public highway or street of the City of Halifax, provided that in working such lines the company should not cut down nor mutilate any trees.

Held, Taschereau and Gwynne, JJ., dissenting, that the owner of private property in the city could maintain an action for damages against the company for injuring ornamental shade trees on the street in front of his property while constructing or working the telephone line, there being nothing in the evidence to rebut the presumption of ownership *ad medium*, or to show that the street had ben laid out under a statute of the province or dedicated to the public before the passing of any expropriation Act.

O'Connor v. *N. S. Telephone Co.* .. xxii., 276

4.—Ontario Municipal Act — Bridges — —Width of Stream—R. S. O. (1887) c. 184, ss. 532, 534.

By the Ontario Municipal Act, R. S. O. [1887] c. 184, s. 532, the council of any county has "exclusive jurisdiction over all bridges crossing streams or rivers over one hundred feet in width within the limits of any incorporated village in the county and connecting any main highway leading through the county," and by s. 534, the County Council is obliged to erect and maintain bridges on rivers and streams of said width. On rivers or streams one hundred feet or less in width the bridges are under the jurisdiction of the respective villages through which the streams flow.

Held, reversing the decision of the Court of Appeal, that the width of a river at the level attained after heavy rain, and freshets each year should be taken into consideration in determining the liability under the Act; the width at ordinary high-water mark is not the test of such liability.

The Village of New Hamburg v. *The County of Waterloo* .. .. xxii., 296

5. — Assessment and Taxes — Ontario Assessment Act, R. S. O. (1887) c. 193, ss. 15, 65—Illegal Assessment—Court of Revision—Business Carried on in two Municipalities.

Section 65 of the Ontario Assessment Act (R. S. O. [1887] c. 193), does not enable the Court of Revision to make valid an assessment which the statute does not authorize.

Section 15 of the Act provides that "where any business is carried on by a person in a

municipality in which he does not reside or in two or more municipalities, the personal property belonging to such persons shall be assessed in the municipality in which such personal property is situated." W., residing and doing business in Brantford, had certain merchandise in London stored in a public warehouse, used by other persons as well as W. He kept no clerk or agent in charge of such merchandise, but when sales were made a delivery order was given upon which the warehouse keeper acted. Once a week a commercial traveller for W., residing in London, attended there to take orders for goods, including the kind so stored, but the sales of stock in the warehouse were not confined to transactions entered in London.

Held, affirming the decision of the Court of Appeal, that W. did not carry on business in London within the meaning of the said section, and his merchandise in the warehouse was not liable to be assessed at London.

City of London v. *Watt* .. .. xxii., 300

6.—By-laws—Power to License, Regulate and Govern Trades—Prohibition of Trading in Certain Streets—Ontario Municipal Act, R. S. O. (1887) c. 184—Repugnancy.

The power given to Municipal Councils by sec. 495 (3) of the Ontario Municipal Act, to pass by-laws for licensing, regulating and governing hawkers, etc., in their respective trades does not authorize the Toronto City Council to prohibit the carrying on of these trades in certain streets. Fournier and Taschereau, JJ., dissenting.

A by-law of the City Council provided that no license should be required from any pedler of fish, farm and garden produce, fruit and coal oil, or other small articles that could be carried in the hand or in a small basket.

Held, affirming the decision of the Court of Appeal, Gwynne and Sedgewick, JJ., dissenting, that a subsequent by-law fixing the amount of a license fee for fish-hawkers and pedlers was not void for repugnancy.

Virgo v. *The City of Toronto* .. xxii., 447

7.—City of Vancouver—Right to Extend Streets to Deep Water—Crossing of Railway—Jus Publicum—Implied Extinction by Statute—Injunction—44 Vic. c. 1, s. 18—Powers of Canadian Pacific Railway Company to take and use Foreshore—49 Vic. c. 32, (B. C.).

By 44 Vic. c. 1, s. 18, the Canadian Pacific Railway Company "have the right to take, use and hold the beach and land below high water mark, in any stream, lake, navigable water, gulf or sea, in so far as the same shall be vested in the Crown, and shall not be required by the Crown, to such extent as shall be required by the company for its railway and other works as shall be exhibited by a map or plan thereof deposited in the office of the Minister of Railways." By 50 & 51 Vic. c. 56, s. 5, the location of the company's line of railway between Port Moody and the City of Westminster, including the foreshore of Burrard Inlet, at the foot of Gore Avenue, Vancouver City, was ratified and confirmed. The Act of incorporation of the City of Vancouver, 49 Vic. c. 32, s. 213 (B. C.), vests in the city all streets, highways, etc., and in 1892 the city began the construction of works extending from the foot of Gore Avenue with the avowed object to cross the railroad track at a level and obtain access to the harbour at deep water. On application by the Railway Company for an injunction to restrain the City Corporation from proceeding with their work of construction, and crossing the railway;

Held, affirming the judgment of the court below, that as the foreshore forms part of the land required by the railway company, as shown on the plan deposited in the office of the Minister of Railways, the *jus publicum* to get access to and from the water at the foot of Gore Avenue is subordinate to the rights given to the railway company by the statute (44 Vic. c. 1, s. 18 *a*), on the said foreshore, and therefore the injunction was properly granted.

The City of Vancouver v. *The Canadian Pacific Railway Co.* .. .. xxiii., 1

8.—Public Street — Encroachment on—Building "upon" or "close to" the Line—Charter of Halifax, ss. 454, 455—Petition to Remove Obstruction—Judgment on—Variance.

By s. 54 of the Charter of the City of Halifax any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the City Engineer and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained the Supreme Court, or a Judge thereof, may, on petition of the Recorder, cause it to be removed. A petition was presented to a Judge, under this section, asking for the removal of a porch built by R. to his house on one of the streets of the city, which, the petition alleged, was upon the line of the street. A

porch had been erected on the same site in 1855 and removed in 1885; while it stood the portion of the street outside of it, and since its removal the portion up to the house, had been used as a public sidewalk; on the hearing of the petition the original line of the street could not be proved, but the Judge held that it was close to the line so used by the public and ordered its removal. The Supreme Court of Nova Scotia reversed his decision.

On appeal to the Supreme Court of Canada:

Held, that the evidence would have justified the Judge in holding that the porch was upon the line, but having held that it was close to the line while the petition only called for its removal as upon it, his order was properly reversed.

City of Halifax v. *Reeves* .. .. xxiii., 340

9.—PRIVATE ROAD—RIGHT OF PASSAGE—GOVERNMENT MONEYS IN AID OF—R. S. Q. ARTS. 1716, 1717 AND 1718—ARTS. 407 AND 1589 C. C.

The proprietor of a piece of land in the parish of Charlesbourg claimed to have himself declared proprietor of a heritage purged from a servitude being a right of passage claimed by his neighbour, the defendant. The road was partly built with the aid of Government and municipal moneys, but no indemnity was ever paid to the plaintiff, and the privilege of passing on said private road was granted by notarial agreement by the plaintiff to certain parties other than the defendant.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada, (appeal side), that the mere granting and spending of a sum of money by the Government and the municipality did not make such private road a colonization road within the meaning of art. 1718 R. S. Q.

Chamberland v. *Fortier* .. .. xxiii., 371

10.—DRAINAGE — ACTION FOR DAMAGES — REFERENCE—DRAINAGE TRIALS ACT, 54 VIC. C. 51—POWERS OF REFEREE—NEGLIGENCE — LIABILITY OF MUNICIPALITY.

Upon reference of an action to a referee under The Drainage Trials Act of Ontario (54 Vic. c. 51), whether under s. 11, or s. 19, the referee has full power to deal with the case as he thinks fit, and to make, of his own motion, all necessary amendments to enable him to decide according to the very right and justice of the case, and may convert the claim for damages under said s. 11 into a claim for damages arising under sec. 591 of the Municipal Act. In a drainage scheme for a single township the work may be carried into a lower adjoining municipality for the purpose of finding an outlet without any petition from the owners of land in such adjoining township to be affected thereby, and such owners may be assessed for benefit. *Stephen* v. *McGillivray* (18 Ont. App. R. 516), and *Nissouri* v. *Dorchester* (14 O. R. 294), distinguished.

One whose lands in the adjoining municipality have been damaged cannot, after the by-law has been appealed against and confirmed and the lands assessed for benefit, contend before the referee to whom his action for such injury has been referred under the Drainage Trials Act, that he was not liable to such assessment, the matter having been concluded by the confirmation of the by-law. The referee has no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by by-law, the only remedy, if any, being by appeal against the project proposed by the by-law.

A municipality constructing a drain cannot let water loose just inside or anywhere within an adjoining municipality without being liable for injury caused thereby to lands in such adjoining municipality.

Where a scheme for drainage work to be constructed under a valid by-law proves defective and the work has not been skilfully and properly performed, the municipality constructing it are not liable to persons whose lands are damaged in consequence of such defects and improper construction, as tort feasors, but are liable under sec. 591 Muncipal Act, for damage done in construction of the work or consequent thereto.

A tenant of land may recover damage suffered during his occupation from construction of drainage work, his rights resting upon the same foundation as those of a freeholder.

Township of Ellice v. *Hiles.*
Township of Ellice v. *Crooks* .. xxiii., 429

11.—BY-LAW—WATER SUPPLY—RATES TO CONSUMERS—DISCRIMINATION.

Under the authority given to municipal corporations to fix the rate or rent to be paid by each owner or occupant of a building, etc., supplied by the corporation with water, the rates imposed must be uniform. Patterson, J., dissenting.

A by-law of the City of Toronto excepting Government institutions from the benefit

of a discount on rates paid within a certain time is invalid as regards such exception. Patterson, J., dissenting.

Attorney-General of Canada v. *City of Toronto* .. .. xxiii., 514

12.—Quebec License Laws—55 & 56 Vic. c. 11, s. 26—City of Sherbrooke—Charter—55 & 56 Vic. c. 51, s. 55—Powers of Taxation.

By virtue of the first clause of a by-law, passed under 55 & 56 Vic. c. 51, an Act consolidating the Charter of the City of Sherbrooke, the appellant was taxed five cents on the dollar on the annual value of the premises in which he carried on his occupation as a dealer in spirituous liquors, and in addition thereto, under clause three of the same by-law, was taxed a special tax of two hundred dollars also for the same occupation. Section 55 of the Act, 55 & 56 Vic. c. 51, enumerates in sub-sections from *a* to *j* the kinds of taxes authorized to be imposed, sub-sec. (*b*) authorizing the imposition of a business tax on all trades, occupations, etc., based on the annual value of the premises, and sub-sec. (*g*) providing for a tax on persons, among others, of the occupation of the petitioner. At the end of sub-sec. (*g*) is the following: "the whole, however, subject to the provisions of the Quebec License Act." The Quebec License Act (art. 927 R. S. Q.), limits the powers of taxation for any municipal council of a city to $200 upon holders of licenses.

Held, affirming the judgment of the court below, that the power granted by 55 & 56 Vic. c. 51, to impose the several taxes was independent and cumulative, and as the special tax did not exceed the sum of $200, the by-law was *intra vires*, the proviso at the end of sub-section (*g*) not applying to the whole section. Taschereau and Gwynne, JJ., dissenting.

Webster v. *City of Sherbrooke* .. xxiv., 268

13.—Ditches and Watercourses Act, R. S. O. (1887) c. 220—Requisition for Drain—Owner of Land—Meaning of Term "Owner."

By sec. 6 (*a*) of the Ditches and Watercourses Act of Ont. (R. S. O. [1887] c. 220), any owner of land to be benefited thereby may file with the clerk of a municipality a requisition for a drain if he has obtained "the assent in writing thereto of (including himself) a majority of the owners affected or interested."

Held, affirming the judgment of the Court of Appeal, that "owner" in this section does not mean the assessed owner; that the holder of any real or substantial interest is an "owner affected or interested;" and that a mere tenant at will can neither file the requisition nor be included in the majority required.

Quære—If the person filing the requisition is not an owner within the meaning of that term are the proceedings valid if there is a majority without him?

Township of Osgoode v. *York* .. xxiv., 282

14. — Negligence — Repair of Street — Accumulation of Ice — Defective Sidewalk.

D. brought an action for damages against the Corporation of the Town of C., for injuries sustained by falling on a sidewalk where ice had formed and been allowed to remain for a length of time.

Held, Gywnne, J., dissenting, that as the evidence at the trial of the action showed that the sidewalk, either from improper construction or from age and long use, had sunk down so as to allow water to accumulate upon it, whereby the ice causing the accident was formed, the corporation was liable.

Held, per Taschereau, J., allowing the ice to form and remain on the street was a breach of the statutory duty to keep the streets in repair, for which the corporation was liable.

Town of Cornwall v. *Durochie* .. xxiv., 301

15.—Canada Temperance Act—Application of Fines Under—Incorporated Town—Separate from County for Municipal Purposes.

By Order in Council made in September, 1886, it is provided that "all fines, penalties or forfeitures recovered or enforced under the Canada Temperance Act, 1878, and amendments thereto, within any city or county or any incorporated town separated for municipal purposes from the county * * * shall be paid to the treasurer of the city, incorporated town, or county," etc.

Held, reversing the decision of the Supreme Court of New Brunswick, King, J., dissenting, that to come within the terms of this order an incorporated town need not be separated from the county for all purposes; it includes any town having municipal self-government even though it contributes to the expense of keeping up certain institutions in the county.

Town of St. Stephen v. *The County of Charlotte* .. .. xxiv., 329

16.—Statute — Directory or Imperative Requirement—Collection of Taxes—Delivery of Roll to Collector—55 Vic. c. 48 (O.).

By sec. 119 of the Ontario Assessment Act (55 Vic. c. 48), provision is made for the preparation every year by the clerk of each municipality of a "collector's roll," containing a statement of all assessments to be made for municipal purposes in the year, and s. 120 provides for a similar roll with respect to taxes payable to the treasurer of the province. At the end of s. 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the first day of October."

Held, affirming the decision of the Court of Appeal, that the provision as to delivery of the roll to the collector was imperative and its non-delivery was a sufficient answer to a suit against the collector for failure to collect the taxes.

Held, also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous section as well as to that for provincial taxes.

Town of Trenton v. *Dyer* .. .. xxiv., 474

17.—Statute—Construction of—Retroactive Effect—Turnpike Road Co.—Erection of Toll Gates—Consent of Corporation.

A turnpike road company had been in existence for a number of years, and had erected toll gates and collected tolls therefor when an Act was passed by the Quebec Legislature, 52 Vic. c. 43, forbidding any such company to place a toll or other gate within the limits of a town or village without the consent of the corporation. Section 2 of said Act provided that "this Act shall have no retroactive effect," which section was repealed in the next session by 54 Vic. c. 36. After 52 Vic. c. 43 was passed, the company shifted one of its toll gates to a point beyond the limits of the village, which limits were subsequently extended so as to bring said gate within them. The corporation took proceedings against the company, contending that the repeal of s. 2 of 52 Vic. c. 43, made that Act retroactive, and that the shifting of the toll gate without the consent of the corporation was a violation of said Act.

Held, affirming the decision of the Court of Queen's Bench, that as a statute is never retroactive unless made so in express terms, s. 2 had no effect, and its repeal could not make it retroactive; that the shifting of the toll gate was not a violation of the Act, which only applied to the erection of new gates, and that the extension of the limits of the village could not affect the pre-existing rights of the company.

Village of St. Joachim de la Pointe Claire v. *The Pointe Claire Turnpike Road Co.*, xxiv., 486

18.—Petition for Drain—Use of Drain as Common Sewer—Connection with Drain—Nuisance—Liability of Householder.

A petition by ratepayers of a township under s. 570 of the Municipal Act of Ontario, asked for a drain to be constructed for draining the property described therein. The township was afterwards annexed to the adjoining city, and the drain was thereafter used as a common sewer, it being as constructed fit for that purpose. In an action against a householder, who had connected the sewage from his house with said drain, for a nuisance occasioned thereby at its outlet:

Held, affirming the decision of the Court of Appeal, Taschereau and Gwynne, JJ., dissenting, that s. 570, in authorizing the construction of a drain "for draining the property" empowered the township to construct a drain for draining not only surface water, but sewage generally, and the householder was not responsible for the consequences of connecting his house with said drain by permission of the city.

Where a by-law provided that no connection should be made with a sewer, except by permission of the City Engineer, a resolution of the City Council granting an application for such connection on terms which were complied with and the connection made was a sufficient compliance with said by-law.

Lewis v. *Alexander* .. .. .. xxiv., 551

19. — Appeal — By-law — Petition to Quash—Appeal to Court of Queen's Bench—40 Vic. c. 29 (Que.)—53 Vic. c. 70 (Que.) — Judgment Quashing — Appeal to Supreme Court from—R. S. C. c. 135, s. 24 (*g*).

Section 439 of the Town Corporations Act (40 Vic. c. 29, Que.), not having been excluded from the Charter of the City of Ste. Cunégonde (53 Vic. c. 70), is to be read as forming a part of it, and prohibits an appeal to the Court of Queen's Bench from a judgment of the Superior Court on a petition to quash a by-law presented under s. 310 of said charter. Where the Court of Queen's Bench has quashed such an appeal for want

of jurisdiction no appeal lies to the Supreme Court of Canada from its decision.

Ste. Cunegonde v. *Gougeon* .. .. xxv., 78

20.—Construction of Statute—By-law—Exclusive Right Granted by—Statute Confirming — Extension of Privilege—45 Vic. c. 79, s. 5 (Que.)—C. S. C. c. 65.

In 1881 a municipal by-law of St. Hyacinthe granted to a company incorporated under a general Act (C. S. C. c. 65), the exclusive privilege for twenty-five years of manufacturing and selling gas in said city, and in 1882 said company obtained a special Act of incorporation, (45 V. c. 79, Que.), section 5 of which provided that "all the powers and privileges conferred upon the said company, as organized under the said general Act, either by the terms of the Act itself or by resolution, by-law or agreement of the said City of St. Hyacinthe, are hereby reaffirmed and confirmed to the company as incorporated under the present Act, including their right to break up, etc., the streets * * * and in addition it shall be lawful for the company, in substitution for gas or in connection therewith, or in addition thereto, to manufacture, use and sell electric, galvanic or other artificial light, and to manufacture, store and sell heat and motive power derived either from gas or otherwise, and to convey the same by gas or otherwise * * * with the same privilege, and subject to the same liabilities, as are applicable to the manufacture, use and disposal of illuminating gas under the provisions of this Act."

Held, affirming the decision of the Court of Queen's Bench, that the above section did not give the company the exclusive right for twenty-five years to manufacture and sell electric light; that the right to make and sell electric light with the same privilege as was applicable to gas did not confer such monopoly, but gave a new privilege as to electricity entirely unconnected with the former purposes of the company; and that the word "privilege" there used could be referred to the right to break up streets and should not, therefore, be construed to mean the exclusive privilege claimed.

Held, also, that it was a private Act notwithstanding it contained a clause declaring it to be a public Act, and the city was not a party nor in any way assented to it; and that in construing it the court would treat it as a contract between the promoters and the legislature and apply the maxim *verba fortius accipiunter contra proferentem* especially where exorbitant powers are conferred.

La Compagnie pour l'Eclairage au gaz de St. Hyacinthe v. *La Compagnie des pouvoirs Hydrauliques de St. Hyacinthe* .. xxv., 168

21.—Trespass — Damages — Easement — Equitable Interest—Municipal By-law, Registration of—Notice—Registry Act, R. S. O. c. 114.

R. S. O. [1877] c. 114, s. 83, providing that no lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration, but applies to all interests.

If the owner of land gives permission to the municipality to construct a drain through it, the municipality, after the work has been done, has an interest in the land to which the registry laws apply whether the agreement conveys the property, creates an easement or is a mere license which has become irrevocable, and if there has been no by-law authorizing the land to be taken such interest is, under the said section, invalid as against a registered deed executed by an assignee of the owner, a purchaser for value without notice. *Ross* v. *Hunter* (7 Can. S. C. R. 289), distinguished.

The City of Toronto v. *Jarvis* .. xxv., 237

22.—Public Highway—Registered Plan—Dedications — User — Statute, Construction of—Retrospective Statute —46 Vic. s. 18 (O.)—Estoppel

The right vested in a municipal corporation by 46 Vic. c. 18 (O.), to convert into a public highway a road laid out by a private person on his property, can only be exercised in respect to private roads, to the use of which the owners of property abutting thereon were entitled.

Gooderham et al. v. *The City of Toronto*, xxv., 246

23.—Special Tax—Ex Post Facto Legislation—Warranty.

Assessment rolls were made by the City of Montreal under 27 & 28 Vic. c. 60 and 29 and 30 Vic. c. 56, apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside as null and the other was lost. The corporation obtained power from the legislature by two special Acts to make new rolls, but in the meantime the property in question had been sold and conveyed by a deed with warranty containing a declaration that all taxes,

both special and general, had been paid. New rolls were subsequently made assessing the lands for the same improvements and the purchaser paid the taxes and brought action against the vendor to recover the amounts so paid.

Held, affirming the judgments in the courts below, Gwynne, J., dissenting, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the sale were therefore the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had become owner of the lands, and that the warranty and declaration by the vendor did not oblige her to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequent to the sale.

La Banque Ville Marie v. *Morrison*, xxv., 289

24.—Municipal By-law—Special Assessments—Drainage—Powers of Council as to Additional Necessary Works——Ultra Vires Resolutions—Executed Contract.

Where a municipal by-law authorized the construction of a drain benefiting lands in an adjoining municipality which was to pass under a railway where it was apparent that a culvert to carry off the water brought down by the drain and prevent the flooding of adjacent lands would be an absolute necessity, the construction of such culvert was a matter within the provisions of sec. 573 of the Municipal Act (R. S. O. [1887] c. 184), and a new by-law authorizing it was not necessary. Taschereau, J., dissenting.

The Canadian Pacific Railway Company v. *The Township of Chatham* .. .. .. xxv., 608

25.—Repair of Streets—Liability for Non-feasance.

In the absence of a statute imposing liability for negligence or non-feasance a municipal corporation is not liable in damages for injury caused to a citizen by reason of a sidewalk having been raised to a higher level than a private way or having been allowed to get out of repair. *Municipality of Pictou* v. *Geldert* ([1893] A. C. 524), and *The Town of Sydney* v. *Bourke* ([1895] A. C. 433), followed.

The City of Saint John v. *Campbell*, xxvi., 1

26.—Constitutional Law—Municipal Corporation—Powers of Legislature—License — Monopoly — Highways and Ferries—Navigable Streams—By-laws and Resolutions — Intermunicipal Ferry — Tolls — Disturbance of Licensee — North-west Territories Act, R. S. C. c. 50, ss. 13 & 24—B. N. A. Act, s. 92, s.-s. 8, 10 & 16—Rev. Ord. N. W. T. (1888) c. 28—N. W. Ter. Ord. No. 7 of 1891-92, s. 4.

The authority given to the Legislative Assembly of the North-West Territories, by R. S. C. c. 50, and Orders in Council thereunder to legislate as to "municipal institutions" and "matters of a local and private nature," (and perhaps as to license for revenue) within the Territories, includes the right to legislate as to ferries.

The Town of Edmonton, by its charter and by "The Ferries Ordinance" (Rev. Ord. N. W. T. c. 28), can grant the exclusive right to maintain a ferry across a navigable river which is not within the territorial limits of the municipality: and as under the charter the powers vested in the Lieutenant-Governor in Council by the Ferries Ordinance are transferred to the municipality, such right may be conferred by license and a by-law is not necessary.

Dinner et al. v. *Humberstone* .. xxvi., 252

27.— Repair of Streets — Pavements — Assessment of Owners—Double Taxation—24 Vic. c. 39 (N. S.)—53 Vic. c. 60, s. 14 (N. S.).

By sec. 14 of the Nova Scotia statute 53 Vic. c. 60, the City Council of Halifax was authorized to borrow money for paving the sidewalks of the city with concrete or other permanent material, one-half of the cost to be a charge against the owners of the respective properties in front of which the work should be done and to be a first lien on such properties. A concrete sidewalk was laid under authority of this statute, in front of L.'s property and he refused to pay half the cost on the ground that his predecessor in title had in 1867, under the Act 24 Vic. c. 39, furnished the material to construct a brick sidewalk in front of the same property and that it would be imposing a double tax on the property if he had to pay for the concrete sidewalk as well.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that there was nothing dubious or uncertain in the Act under which the concrete sidewalk was laid; that it authorized no exception in favour of property owers who had contributed to the cost of sidewalks laid under the Act of 1861; and that to be called upon to pay half the cost of a concrete sidewalk in 1891 would not be paying twice for the

same thing because in 1867 the property had contributed bricks to construct a sidewalk which, in 1891, had become worn out, useless and dangerous.

The City of Halifax v. *Lithgow* .. xxvi., 336

28. — Municipal Corporation — By-law — Assessment — Local Improvements — Agreement with Owners of Property —Construction of Subway—Benefit to Lands.

An agreement was entered into by the Corporation of Toronto with a railway company and other property owners for the construction of a subway under the tracks of the company ordered by the Railway Committee of the Privy Council, the cost to be apportioned between the parties to the agreement. In connection with the work a roadway had to be made, running east of King Street to the limit of the subway the street being lowered in front of the company's lands, which were to some extent, cut off from abutting as before on certain streets; a retaining wall was also found necessary. By the agreement the company abandoned all claims to damages for injury to its lands by construction of the works. The city passed a by-law assessing on the company its portion of the cost of the roadway as a local improvement, the greater part of the property so assessed being on the approach to the subway.

Held, that to the extent to which the lands of the company were cut off from abutting on the street as before the work was an injury, and not a benefit to such lands and therefore not within the clauses of the Municipal Act as to local improvements; that as to the length of the retaining wall the work was necessary for the construction of the subway and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement.

Held, further, that as the by-law had to be quashed as to three-fourths of the work affected, it could not be maintained as to the residue which might have been assessable as a local improvement if it had not been coupled with work not so assessable.

Notice to a property owner of assessment for local improvements under sec. 622 of the Municipal Act cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act.

In the result the judgment of the Court of Appeal (23 Ont. App. R. 250), was affirmed.

City of Toronto v. *Canadian Pacific Railway Co.* .. .. xxvi., 682

29.—Negligence—Snow and Ice on Sidewalks — By-law — Construction of Statute—55 Vic. c. 42, s. 531—57 Vic. c. 50, s. 13—Finding of Jury—Gross Negligence.

A by-law of the City of Kingston requires frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being injured brought an action of damages against the city and obtained a verdict. The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks; notice of action in such case must be given, but may be dispensed with on the trial if the court is of opinion that there was reasonable excuse for the want of it, and that the corporation has not been prejudiced in its defence.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair; *Cornwall* v. *Derochie* (24 Can. S. C. R. 301), followed; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the Act; that "gross negligence" in the Act means very great negligence, of which the jury found the corporation guilty; and that an appellate court would not interfere with the discretion of the trial judge in dispensing with notice of action.

The City of Kingston v. *Drennan*, xxvii., 46

30.—Appeal—Jurisdiction—Expropriation of Lands — Assessments — Local Improvements — Future Rights — Title to Lands and Tenements—R. S. C. c. 135, s. 29 (*b*); 56 Vic. c. 29, s. 1 (D.).

A by-law was passed for the widening of

a portion of a street up to a certain homologated line, and for the necessary expropriations therefor. Assessments for the expropriations for certain years having been made whereby proprietors of a part of the street were relieved from contributing any proportion to the cost, thereby increasing the burden of assessment on the properties actually assessed, the owners of these properties brought an action to set aside the assessments. The Court of Queen's Bench affirmed a judgment dismissing the action. On an application for leave to appeal,

Held, that as the effect of the judgment sought to be appealed from would be to increase the burden of assessment not only for the expropriations then made, but also for expropriations which would have to be made in the future, the judgment was one from which an appeal would lie, the matter in controversy coming within the meaning of the words "and other matters or things where the rights in future might be bound," contained in sub-sec. (*b*), of sec. 29 Supreme and Exchequer Courts Act, as amended by 56 Vic. c. 29, s. 1.

Stevenson v. *The City of Montreal*, xxvii., 187

31.—Waterworks—Extension of Works—Repairs—By-law—Resolution—Agreement in Writing—Injunction—Highways and Streets—R. S. Q. Art. 4485—Art. 1033*a* C. C. P.

By a resolution of the Council of the Town of Chicoutimi, on 9th October, 1890, based upon an application previously made by him, L. obtained permission to construct waterworks in the town and lay the necessary pipes in the streets wherever he thought proper, taking his water supply from the River Chicoutimi at whatever point might be convenient for his purposes, upon condition that the works should be commenced within a certain time and completed in the year 1892. He constructed a system of waterworks and had it in operation within the time prescribed, but the system proving insufficient a company was formed in 1895 under the provisions of R. S. Q., art. 4485, and given authority by by-law to furnish a proper water supply to the town, whereupon L. attempted to perfect his system, to alter the position of the pipes, to construct a reservoir and to make new excavations in the streets for these purposes without receiving any further authority from the council.

Held, reversing the judgment appealed from, Gwynne, J., dissenting, that these were not merely necessary repairs but new works, actually part of the system required to be completed during the year 1892, and which after that date could not be proceeded with except upon further permission obtained in the usual manner from the council of the town.

Held, further, that the resolution and the application upon which it was founded constituted a "contract in writing" and a "written agreement" within the meaning of art. 1033*a* of the Code of Civil Procedure of Lower Canada, and violation of its conditions was a sufficient ground for injunction to restrain the construction of the new works.

La Ville de Chicoutimi v. *Légaré*, xxvii., 32)

32.—Assessment and Taxation—Exemptions — Real Property — Chattels — Fixtures — Gas Pipes — Highway — Title to Portion—Legislative Grant of Soil—11 Vic. c. 14 (Can.)—55 Vic. c. 48 (Ont.)—"Ontario Assessment Act, 1892."

Gas pipes which are the property of a private corporation laid under the highways of a city are real estate within the meaning of the "Ontario Assessment Act of 1892" and liable to assessment as such, as they do not fall within the exemptions mentioned in the sixth section of that Act.

The enactment effected by the first and thirteenth clauses of the company's Act of incorporation (11 Vic. c. 14), operated as a legislative grant to the company of so much of the land of the streets, squares and public places of the city as might be found necessary to be taken and held for the purposes of the company and for the convenient use of the gas works, and when the openings where pipes may be laid are made at the place designated by the City Surveyor, as provided in said charter, and they are placed there, the soil they occupy is land taken and held by the company under the provisions of the said Act of incorporation.

The proper method of assessment of the pipes so laid and fixed in the soil of the streets, squares and public places in a city ought to be separately in the respective wards of the city in which they may be actually laid, as in the case of real estate.

The Consumers' Gas Co. v. *City of Toronto*, xxvii., 453

33.—Drainage—Assessment — Inter-municipal Obligations as to Initiation and Contributions — By-law — Ontario Drainage Act of 1873—36 Vic. c. 38 (O.)—36 Vic. c. 39 (O.)—R. S. O. (1887) c. 184—Ontario Consolidated Municipal Act of 1892—55 Vic. c. 42 (O.).

The provision of the Ontario Municipal Act (55 Vic. c. 42, s. 590), that if a drain constructed in one municipality is used as an outlet or will provide an outlet for the water of lands of another the lands in the latter so benefited may be assessed for their proportion of the cost, applies only to drains properly so called and does not include original watercourses which have been deepened or enlarged.

If a municipality constructing such a drain has passed a by-law purporting to assess lands in an adjoining municipality for contribution to the cost a person whose lands might appear to be affected thereby, or by any by-law of the adjoining municipality proposing to levy contributions toward the cost of such works, would be entitled to have such other municipality restrained from passing a contributory by-law, or taking any steps towards that end, by an action brought before the passing of such contributory by-law.

Broughton v. *Grey and Elma* .. xxvii., 495

34.—Master and Servant—Hiring of Personal Services—Appointment of Officers—Summary Dismissal—Libellous Resolution—Statute, Construction of—Difference in Text of English and French Versions—52 Vic. c. 79, s. 79 (Q.)—"A Discretion"—"At Pleasure."

The Charter of the City of Montreal, 1889 (52 Vic. c. 79), section 79 gives power to the City Council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "*a sa discrétion*," while the English version has the words "*at its pleasure*."

Held, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment and the City Council was thereby given full and unlimited power, in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal.

Davis v. *City of Montreal* .. .. xxvii., 539

35.—Public Market—Nuisance—Licensing Traders and Hucksters — Obstructing Streets and Sidewalks—Loss of Rent—Damages.

The Court of Queen's Bench, reversing the decision of the Superior Court, District of Montreal, held that the City of Montreal was not responsible for injury to the owner of property in the vicinity of a public market by reason of the street being encumbered on market days, provided reasonable efforts were made by the civic officials to prevent crowds from becoming stationary or preventing free access and egress to or from the premises (Q. R. 7 Q. B. 1).

On appeal to the Supreme Court of Canada the judgment of the Court of Queen's Bench was affirmed.

Davidson et al. v. *The City of Montreal*, 6th May, 1898 .. .. xxviii., 421

36.—Assessment—Extra Cost of Works—Drainage—R. S. O. (1887) c. 174—46 Vic. c. 18 (Ont.)—By-laws—Repairs—Misapplication of Funds—Negligence — Damages — Reassessment — Inter-municipal Works.

Where a sum amply sufficient to complete drainage works, as designed and authorized by the by-law for the complete construction of the drain, has been paid to the municipality which undertook the works, to be applied towards their construction, and was misapplied in a manner and for a purpose not authorized by their by-law, such municipality cannot afterwards, by another by-law, levy or cause to be levied from the contributors of the funds so paid any further sum to replace the amount so misapplied or wasted.

The Township of Sombra v. *The Township of Chatham* .. .. xxviii., 1

37. — Highway — Encroachment upon Street—Negligence — Nuisance—Obstruction of Show-window — Municipal Officers—Action for Damages—Misfeasance During Prior Ownership—Non-feasance—Statutable Duty.

An action does not lie against a municipal corporation for damages in respect of mere non-feasance, unless there has been a breach of some duty imposed by law upon the corporation. *The Municipality of Pictou* v. *Geldert* (1893) A. C. 524, and *The Municipal Council of Sydney* v. *Bourke* (1895) A. C. 433, followed.

An action does not lie against a municipal corporation by the proprietor of lands for damages in respect thereof, through the mistake or misfeasance of the corporation or its officers, alleged to have occurred prior to the acquisition of his title thereto.

A municipal corporation is not civilly responsible for acts of its officers or servants other than those done within the scope of their authority as such.

City of Montreal v. *Mulcair et al.*, xxviii., 458

38.—Highways—Old Trails in Rupert's Land — Substituted Roadway—Necessary Way—R. S. C. c. 50, s. 108—Reservation in Crown Grant—Dedication—User — Estoppel — Assessment of Lands Claimed as Highway—Evidence.

The user of old travelled roads or trails over the waste lands of the Crown in the North-West Territories of Canada, prior to the Dominion Government Survey thereof does not give rise to a presumption that the lands over which they passed were dedicated as public highways.

The lands over which an old travelled trail had formerly passed, leading to the Hudson Bay Trading Post at Edmonton, N. W. T., had been enclosed by the owner, divided into towns lots and was for several years assessed and taxed as private property by the municipality, and a new street substituted therefor as shewn upon registered plans of sub-division and laid out upon the ground had been adopted as a boundary in the descriptions of lands abutting thereon in the grants by letters patent from the Crown.

Held, reversing the decision of the Supreme Court of the North-West Territories that under the circumstances there could be no presumption of dedication of the lands over which the old trial passed as a public highway, either by the Crown or by the private owner, notwithstanding long user of the same by settlers in that district prior to the Dominion Government Survey of the Edmonton Settlement.

Heiminck v. *Town of Edmonton*, xxviii., 501

39.—By-law—Construction of Statute—R. S. Q. Art. 4529—Approval of Electors.

Under the provisions of Art. 4529 R. S. Q., money By-laws for loans by town corporations require the approval both in number and in value of the municipal electors who are proprietors of real estate within the municipality, as ascertained from the municipal rolls.

The Town of Chicoutimi v. *Price*, 12th Oct., 1898 .. .. xxix.

39*a*.—Municipal Corporation — By-law — Railway Aid — Subscription for Shares — Debentures — Division of County—Erection of New Municipalities—Assessment—Sale of Shares at Discount—Action en Reddition de Comptes—Trustee—Debtor and Creditor—Arts. 78, 164, 939 Mun. Code, Que.—24 Vic. c. 30 (Que.)—39 Vic. c. 50, (Que.).

An action *en reddition de comptes* does not lie against a trustee invested with the administration of a fund, until such administration is complete and terminated.

The relation existing between a County Corporation under the provisions of the Municipal Code of the Province of Quebec, and the local municipalities of which it is composed, in relation to money by-laws, is not that of agent or trustee, but the County Corporation is a creditor, and the several local municipalities are its debtors for the amount of the taxes to be assessed upon their ratepayers respectively.

Where local municipalities have been detached from a county and erected into separate corporations they remain in the same position, in regard to subsisting money by-laws, as they were before the division and have no further rights or obligations than if they had never been separated therefrom, and they cannot either conjointly or individually institute actions against such County Corporation to compel the rendering of special accounts of the administration of funds in which they have an interest, their proper method of securing statements being through the facilities afforded by article 164 and other provisions of the Municipal Code.

The Township of Ascott v. *The County of Compton*; *The Village of Lennoxville* v. *The County of Compton*, 14th Dec., 1898 .. xxix.

39*b*.—Expropriation—Widening Streets—Excessive Valuation — Assessment — Setting Aside Roll—52 Vic. c. 79, s. 228 (Que.)

A piece of land forming part of a lot numbered 32, was benefited by the widening of St. Nicolas Street, in Montreal, on which it fronted. The expropriation commissioners, in error, supposed that the whole lot 32, (including the river front in rear owned by another person), was liable to be charged for

the improvement, and placed it on the assessment roll providing for the expense of enlarging the street, basing the amount charged against it upon the valuation of the whole lot. Afterwards, becoming aware of their mistake, instead of preparing a new roll to equalize the assessments on the lands benefited, they imposed the whole sum thus assessed upon the part of lot 32 fronting on St. Nicolas Street, and, in order to make it bear such an assessment, gave it an excessive valuation. The Court of Queen's Bench [Q. R. 7 Q. B. 214], reversed the decision of the Superior Court, District of Montreal, and held, that the expropriation commissioners had proceeded illegally in making the assessment thereby causing grave injustice to the owner of the land in question and annulled and set aside the assessment roll.

On appeal to the Supreme Court of Canada, after hearing counsel for the appellant, and without calling upon counsel for the respondent, the court dismissed the appeal, and affirmed the judgment of the Court of Queen's Bench.

City of Montreal v. *Ramsay*, 21st Nov., 1898, xxix.

40.—By-law—Bonus—Conditions of—Construction of Term in Condition.

See By-law, 1.

41.—By-law—Tax on Working Horse—Charter of Street Railway Co.—Payment for Horses by.

See Assessment, 4.

42.—Public Street—Dedication—Obstruction—Right of Owner or Occupier to Compensation.

See Dedication, 1.

43.—Action for Personal Injuries—Third Party Added as Defendant—Admissibility of Evidence.

See Evidence, 3.

44.—By-law—Drainage—Petition for Drain—Withdrawal of Name—Improper Construction—Repairs.

See Drainage, 1.

45.—High School District—Townships Detached—By-law.

See Schools, 1.

46.—By-law—Petition to Annul—R. S. Q. Art. 4389—Right of Appeal—R. S. C. c. 135, s. 24 (*g*).

See Appeal, 22.

47.—Sale of Liquor—Local Option—53 Vic. c. 56, s. 18 (O.)—54 Vic. c. 46, (O.)—Powers of Local Legislature.

See Constitutional Law, 7.

48.—Obstruction of Street—Accumulation of Snow—Street Railway.

See Negligence, 14.

49.—Construction of Drain—Action for Damages—Reference—Appeal from Referee's Report—Confirmation by Lapse of Time.

See Practice, 17.

50.—Action of Warranty—Negligence—Obstruction of Street—Assessment of Damages—Questions of Fact.

See Appeal, 44.

51.—Highway—Private Way—Widening Streets—Special Assessments—Res Judicata.

See Res Judicata, 10.

52.—Municipal Regulations—Edits et Ordonnances, L. C.

See Servitude, 2.

53.—By-law—Widening Streets—Expropriation—Title to Lands.

See Appeal, 62.

54.—Statute, Construction of—55 Vic. c. 42, ss. 397, 404, 469, 473 (Ont.)—City Separated from County—Maintenance of Court House and Gaol—Care and Maintenance of Prisoners.

See Arbitration, 4.

NAVIGABLE WATERS.

1.—Constitutional Law—Title to Alveus—Crown—Dedication of Public Lands—Presumption of Dedication—User—Obstruction to Navigation—Public Nuisance—Balance of Convenience.

The title to the soil in the beds of navigable rivers is in the Crown in right of the Provinces, not in right of the Dominion. *Dixon* v. *Snetsinger* (23 U. C. C. P. 235), discussed.

By 23 Vic. c. 2, s. 35 (Can.), power was given to the Crown to dispose of and grant water lots in rivers and other navigable waters in Upper Canada, and the power to grant the soil carried with it the power to dedicate it to the public use.

The user of a bridge over a navigable river for thirty-five years is sufficient to raise a presumption of dedication.

If a province before Confederation had so dedicated the bed of a navigable river for the purposes of a bridge that it could not have objected to it as an obstruction to navigation the Crown as representing the Dominion, on assuming control of the navigation, was bound to permit the maintenance of the bridge.

An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes.

It is a public nuisance though of very great public benefit and the obstruction of the slightest possible degree.

The Queen v. *Moss* .. .. .. xxvi., 322

2.—Constitutional Law—Municipal Corporation — Powers of Legislature — License — Monopoly — Highways and Ferries — Navigable Streams — By-laws and Resolutions — Intermunicipal Ferry—Tolls—Disturbance of Licensee — North-west Territories Act, R. S. C. c. 50, ss. 13 and 24—B. N. A. Act (1867) s. 92, s.s. 8, 10 and 15—Rev. Ord. N. W. Ter. (1888) c. 28—Ord. N. W. T. No. 7 of 1891-92, s. 4—Companies, Club Associations and Partnerships.

See Constitutional Law, 14.

3.—Canadian Waters—Property in Alveus—Public Harbours—Erections in Navigable Waters — Interference with Navigation—Rights of Fishing—Power to Grant — Riparian Proprietors—Great Lakes and Navigable Rivers—Operation of Magna Charta — Provincial Legislation—R. S. O. (1887) c. 24, s. 47—55 Vic. c. 10, ss. 5 to 13, 19 and 21 (O.)—R. S. Q. Arts. 1375 to 1378.

See Constitutional Law, 17.

NAVIGATION.

1. — Constitutional Law — Navigable Waters — Title to Alveus — Crown — Dedication of Public Lands — Presumption of Dedication — User — Obstruction to Navigation—Public Nuisance—Balance of Convenience.

See Constitutional Law, 15.

2. — Canadian Waters — Property in Alveus—Public Harbours—Erections in Navigable Waters—Interference with Navigation—Right of Fishing—Power to Grant — Riparian Proprietors—Great Lakes and Navigable Rivers—Operation of Magna Charta —Provincial Legislation—R. S. O. (1887) c. 24, s. 47—55 Vic. c. 10, ss. 5 to 13, 19 and 21 (O.)—R. S. Q. Arts. 1375 to 1378.

See Constitutional Law, 17.

3.—Maritime Law — Collision—Rules of the Road—Narrow Channel—Navigation, Rules of—R. S. C. c. 79, s. 2, Arts. 15, 16, 18, 19, 21, 22 and 23—"Crossing" Ships—"Meeting" Ships—"Passing" Ships—Breach of Rules—Presumption of Fault—Contributory Negligence—Moiety of Damages—36 & 37 Vic. (Imp.) c. 85, s. 17—Manœuvres in "Agony of Collision."

See Ships and Shipping, 2.

NEGLIGENCE.

1. — Loading of Steamer — Accident — Neglect of Usual Precaution — Liability of Employer.

When two stevedores are independently engaged in loading the same steamer, and, owing to the negligence of the employees of the one, an employee of the other is injured, the former stevedore is liable in damages for such injury.

The failure to observe a precaution usually taken in and about such work is evidence of negligence. Gwynne, J., dissenting.

Brown v. *Leclerc* .. .. xxii., 53

2.—Negligence — Proximate Cause—Danger Voluntarily Incurred.

C. having driven his horses into a lumber yard adjoining a street on which blasting operations were being carried on, left them in charge of the owner of another team while he interviewed the proprietor of the yard. Shortly after a blast went off and stones thrown by the explosion fell on the roof of a shed in which C. was standing and frightened the horses, which began to run. C. at once ran out in front of them and endeavoured to stop them, but could not, and in trying to get away he was injured. He brought an action against the municipality conducting the blasting operations to recover damages for such injury.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the negligent manner in which the blast was set off was the proximate and first cause of

the injury to C.; that such negligent act immediately produced in him the state of mind which instinctively impelled him to attempt to stop the horses; and that he did no more than any reasonable man would have done under the circumstances.

Town of Prescott v. *Connell* .. .. xxii., 147

3.—Passenger Vessel—Use of Wharf—Invitation to Public—Accident in Using Wharf—Proximate Cause—Excessive Damages.

A company owning a steamboat making weekly trips between Boston and Halifax occupied a wharf in the latter city leased to their agent. For the purpose of getting to and from the steamer there was a plank sidewalk on one side part way down the wharf and persons using it usually turned at the end and passed to the middle of the wharf. Y. and his wife went to meet a passenger expected to arrive by the steamer between seven and eight o'clock one evening in November. They went down the plank sidewalk and instead of turning off at the end, there being no lights, and the night dark, they continued straight down the wharf which was narrowed after some distance, and formed a jog, on reaching which Y.'s wife tripped and as her husband tried to catch her they both fell into the water. Forty-four days afterwards Mrs. Y. died. In an action by Y. against the company to recover damages occasioned by the death of his wife it appeared that the deceased had not had regular and continual medical treatment after the accident and the doctors who gave evidence at the trial differed as to whether or not the immersion was the proximate cause of her death. The jury when asked: Would the deceased have recovered, notwithstanding the accident, if she had had regular and continual attendance? replied, "very doubtful." A verdict was found for the plaintiff with $1,500 damages, which the Supreme Court of Nova Scotia set aside, and ordered a new trial. On appeal from that decision:

Held, that Y. and his wife were lawfully upon the wharf at the time of the accident; that in view of the established practice they had a right to assume that they were invited by the company to go on the wharf and assist their friends in disembarking from the steamer; and that they had a right to expect that the means of approach to the steamer were safe for persons using ordinary care, and the company was under an obligation to see that they were safe.

Held, further, that it having been proved that the wharf was only rented to the agent because the landlord preferred to deal with him personally, and that it was rented for the use of the company, whose officers had sole control of it, the company was in possession of it at the time of the accident.

Held, also, that the evidence and finding of the jury having left it in doubt that the accident was the proximate cause of Mrs. Y.'s death the jury not having been properly instructed as to the liability of the company under the circumstances, and the damages being excessive under the evidence, the order for a new trial should be affirmed.

York v. *Canada Atlantic SS. Co.*, xxii., 167

4.—Street Railway—Height of Rails—Statutory Obligation—Accident to Horse.

The charter of a street railway Co., required the road between, and for two feet outside of, the rails to be kept constantly in good repair and level with the rails. A horse crossing the track stepped on a grooved rail and the caulk of his shoe caught in the groove whereby he was injured. In an action by the owner against the company it appeared that the rail, at the place where the accident occurred, was above the level of the roadway.

Held, affirming the judgment of the Supreme Court of Nova Scotia that as the rail was above the road level, contrary to the requirements of the charter, it was a street obstruction unauthorized by statute, and, therefore, a nuisance, and the company was liable for the injury to the horse caused thereby.

Halifax Street Ry. Co. v. *Joyce* .. xxii., 258

5.—Railway Accident to Passenger—Train Longer than Platform—Damages—Negligence.

L. was the holder of a ticket, and passenger on the company's train from Lévis to Ste. Marie, Beauce. When the train arrived at Ste. Marie station the car upon which L. had been travelling was some distance from the station platform, the train being longer than the platform, and L. fearing that the car would not be brought up to the station, the time for stopping having nearly elapsed, got out of the end of the car, the distance to the ground from the steps being about two feet and a half, and in so doing he fell and broke his leg which had to be amputated. The action was for $5,000 damages, alleging negligence

and want of proper accommodation. The defence was contributory negligence. Upon the evidence the Superior Court whose judgment was affirmed by the Court of Queen's Bench, gave judgment in favour of L. for the whole amount. On appeal to the Supreme Court of Canada:

Held, reversing the judgments of the courts below, that in the exercise of ordinary care, L. could have safely gained the platform by passing through the car forward, and that the accident was wholly attributable to his own default in alighting as he did and therefore he could not recover. Fournier, J., dissenting.

The Quebec Central Railway Co. v. *Lortie*, xxii., 336

6.—Railway Company—Injury to Employee—Finding of Jury—Interference with on Appeal.

W. was an employee of the G. T. R. Co., whose duty it was to couple cars in the Toronto yard of the Co. In performing this duty on one occasion, under specific directions from the conductor of an engine attached to one of the cars being coupled, his hand was crushed owing to the engine backing down and bringing the cars together before the coupling was made. On the trial of an action for damages resulting from such injury the conductor denied having given directions for the coupling, and it was contended that W. improperly put his hand between the draw bars to lift out the coupling pin. It was also contended that the conductor had no authority to give directions as to the mode of doing the work. The jury found against both contentions and W. obtained a verdict which was affirmed by the Divisional Court and Court of Appeal.

Held, per Fournier, Taschereau and Sedgewick, JJ., that though the findings of the jury were not satisfactory upon the evidence a second Court of Appeal could not interfere with them.

Held, per King, J., that the finding that specific directions were given must be accepted as conclusive; that the mode in which the coupling was done was not an improper one, as W. had a right to rely on the engine not being moved until the coupling was made, and could properly perform the work in the most expeditious way, which it was shown he did; that the conductor was empowered to give directions as to the mode of doing the work if, as was stated at the trial, he believed that using such a mode could save time; and that W. was injured by conforming to an order to go to a dangerous place, the person giving the order being guilty of negligence.

Grand Trunk Railway Co. v. *Weegar*, xxiii., 422

7.—Drainage—Adjoining Municipalities—Defective Scheme—Tort Feasors.

A municipality constructing a drain cannot let water loose just inside or anywhere within an adjoining municipality without being liable for injury caused thereby to lands in such adjoining municipality.

Where a scheme for drainage work to be constructed under a valid by-law proves defective and the work has not been skilfully and properly performed, the municipality constructing it are not liable to persons whose lands are damaged in consequence of such defects and improper construction, as tort feasors, but are liable under sec. 591, Municipal Act, for damage done in construction of the work or consequent thereon.

Township of Ellice v. *Hiles.*

Township of Ellice v. *Crooks* .. xxiii., 429

And *see* Municipal Corporation, 4.

8.—Building—Want of Repair—Damages—Art. 1055 C. C.—Trustees—Personal Liability of—Executors—Arts. 921, 981*a*, C. C.

The owner of property abutting on a highway is under a positive duty to keep it from being a cause of danger to the public by reason of any defect, either in structure, repair, or use and management, which reasonable care can guard against

A. T. sued J. F. and M. W. F. personally as well as in their quality of testamentary executors and trustees of the will of the late J. F. claiming $4,000 damages for the death of her husband who was killed by a window falling on him from the third story of a building, which formed part of the general estate of the late J. F., but which had been specifically bequeathed to one G. F. and his children, for whom the said J. F. and M. W. F. were also trustees. The judgment of the courts below held the appellants liable in their capacity of executors of the general estate and trustees under the will.

Held, that the appellants were responsible for the damages resulting from their negligence in not keeping the building in repair as well personally as in their quality of trustees (*d'héritiers fiduciaries*) for the benefit of G. F.'s children; but were not liable as executors of the general estate.

Ferrier v. *Trepannier* .. .. .. xxiv., 86

9.—Workman in Factory — Evidence — Questions of Fact — Interference with on Appeal.

W., a workman in a factory, to get to the room where he worked had to pass through a narrow passage, and at a certain point to turn to the left while the passage was continued in a straight line to an elevator. In going to his work at an early hour one morning he inadvertently walked straight along the passage and fell into the well of the elevator, which was undergoing repairs. Workmen engaged in making such repairs were present at the time with one of whom W. collided at the opening, but a bar usually placed across the opening was down at the time. On appeal in an action against his employers in consequence of such accident,

Held, affirming the decision of the Court of Appeal, Strong, C.J., *hesitante*, Taschereau, J., dissenting, that there was no evidence of negligence of the defendants to which the accident could be attributed and W. was properly non-suited at the trial.

Held, per Strong, C.J., that though the case might properly have been left to the jury, as the judgment of non-suit was affirmed by two courts it should not be interfered with.

Headford v. *McClary Mfg. Co.* .. xxiv., 291

10.—Municipal Corporation—Repair of Street—Accumulation of Ice—Defective Sidewalk.

D. brought an action for damages against the corporation of the Town of C. for injuries sustained by falling on a sidewalk where ice had formed and been allowed to remain for a length of time.

Held, Gwynne, J., dissenting, that as the evidence at the trial of the action showed that the sidewalk, either from improper construction or from age and long use, had sunk down so as to allow water to accumulate upon it whereby the ice causing the accident was formed, the corporation was liable.

Held, per Taschereau, J.—Allowing the ice to form and remain on the street was a breach of the statutory duty to keep streets in repair for which the corporation was liable.

Town of Cornwall v. *Derochie* .. xxiv., 301

11.—Crown—Negligence of Servants or Officers—Common Employment — Law of Quebec—50 & 51 Vic. c. 16, s. 16 (*c*).

A petition of right was brought by F. to recover damages for the death of his son caused by the negligence of servants of the Crown while engaged in repairing the Lachine Canal.

Held, affirming the decision of the Exchequer Court, Taschereau, J., dissenting, that the Crown was liable under 50 & 51 Vic. c. 16, s. 16 (*c*); and that it was no answer to the peititon to say that the injury was caused by a fellow servant of the deceased, the case being governed by the law of the Province of Quebec, in which the doctrine of common employment has no place.

The Queen v. *Filion* .. .. .. xxiv., 482

12.—Street Railway—Wrongful Ejectment from Car—Exposure to Cold—Consequent Illness — Damages — Remoteness of Cause.

In an action for damages from being wrongfully ejected from a street car, illness resulting from exposure to cold in consequence of such ejectment is not too remote a cause for damages; and where the evidence was that the person ejected was properly clothed for protection against the severity of the weather, but was in a state of perspiration from an altercation with the conductor when he left the car and so liable to take cold, the jury were justified in finding that an attack of rheumatism and bronchitis which ensued was the natural and probable result of the ejectment, and in awarding damages therefor. Gwynne, J., dissenting.

Toronto Ry. Co. v. *Grinsted* .. xxiv., 570

13.—Street Railway Car—Collision with Vehicle—Excessive Speed—Contributory Negligence.

Persons crossing the street railway tracks are entitled to assume that the cars will be driven moderately and prudently, and if an accident happens through a car going at an excessive rate of speed the street railway company is responsible.

The driver of a cart struck by a car in crossing a track is not guilty of contributory negligence because he did not look to see if a car was approaching if, in fact, it was far enough away to enable him to cross if it had been proceeding moderately and prudently. He can be in no worse position than if he had looked and seen that there was time to cross. Gwynne, J., dissenting.

Toronto Ry. Co. v. *Gosnell* .. .. xxiv., 582

14.—Obstruction of Street—Accumulation of Snow—Question of Fact—Finding of Jury.

An action was brought against the City of Toronto to recover damages for injuries incurred by reason of snow having been piled

on the side of the streets, and the street railway company was brought in as third party. The evidence was that the snow from the sidewalks was placed on the roadway immediately adjoining by servants of the city and snow from the railway tracks was placed by servants of the railway company upon the roadway immediately adjoining the track without any permission from the city, thus raising the roadway next to the track, where the accident occurred, to a height of about twenty inches above the rails. The jury found that the disrepair of the street was the act of the railway company, which was therefore made liable over to the city for the damages assessed. The company contended on appeal that the verdict was perverse and contrary to evidence.

Held, affirming the decision of the Court of Appeal, that under the evidence given of the manner in which the snow from the track had been placed on the roadway immediately adjoining, the jury might reasonably be of opinion that if it had not been so placed there the accident would not have happened, and that this was the sole cause of the accident.

Toronto Ry. Co. v. *The City of Toronto*, xxiv., 589

15. — Use of Dangerous Machinery — Orders of Superior — Reasonable Care.

O. was employed in a factory for the purpose of heating rivets, and one morning, with another workman, he was engaged in oiling the gearing, etc., of the machinery which worked the drill in which the rivets were made. Having oiled a part the other workman went away for a time, during which O. saw that the oil was running off the horizontal shaft of the drill and called the attention of the foreman of the machine shop to it, and to the fact that the shaft was full of ice. The foreman said to him, "Run her up and down a few times and it will thaw her off." The shaft was seven feet from the floor and on it was what is called a buggy which could be moved along it on wheels. Depending from the buggy was a straight iron rod into the hollow end of which was inserted the drill secured by a screw, and attached to the buggy was a lever over six feet long. O. when so directed by the foreman tried to move the buggy by means of the lever but found he could not. He then went round to the back of the spindle and not being able then to move the buggy came round to the front, put his two hands upon a jacket around the spindle and put the weight of his body against it; it then moved and he stepped forward to recover his balance, when the screw securing the drill caught him about the middle of the body and he was seriously injured. In an action against his employers for damages it was shown that O. had no experience in the mode of moving the buggy and that the screw should have been guarded.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the jury were warranted in finding that there was negligence in not having the screw guarded; that as the foreman knew that O. had no experience as to the ordinary mode of doing what he was told, he was justified in using any reasonable mode; that he acted within his instructions in using the only efficient means that he could; and that under the evidence he used ordinary care.

Hamilton Bridge Co. v. *O'Connor*, xxiv., 598

16.—Master and Servant — Employers' Liability Act—Evidence--New Trial —Imprudence.

A workman in defendants' mill, brought an action for damages in consequence of being injured while passing over a set of cogs which were left uncovered, and upon which he slipped and had his leg dragged in by the cogs before they could be stopped. The jury found that there were other passage ways for plaintiff to use in fulfilling his duties, but that none of them was sufficient and the way used was more expeditious; that the non-covering of the cogs left a defective way; and that the plaintiff was not unduly negligent. The trial Judge held that the plaintiff voluntarily incurred the risk and dismissed the action. His decision was reversed by the full court and a verdict entered for plaintiff with damages as assessed by the jury.

On further appeal the Supreme Court of Canada reversed the decision of the Supreme Court of British Columbia and ordered a new trial, on the ground that it was not sufficiently established that plaintiff had of reasonable and practical necessity to pass over a set of cogs, which, being uncovered, were in a dangerous and defective state as charged in the statement of claim.

British Columbia Mills Co. v. *Scott*, 11th March, 1895 .. .. xxiv., 702

17.—Infant—Imprudence.

The action was brought by plaintiff, as next friend to his infant son, to recover damages for injuries sustained by the son from a portable mirror falling upon him when with her in defendants' shop in Toronto. The

trial Judge found that there was no evidence of negligence by defendants to be submitted to the jury, and dismissed the action. The Divisional Court reversed his decision and ordered a new trial (25 O. R. 78), and its judgment was affirmed by the Court of Appeal for Ontario (21 Ont. App. R. 624).

The Supreme Court of Canada affirmed the judgment appealed from and dismissed the appeal with costs.

T. Eaton Co. v. *Sangster*, 2nd April, 1895, xxiv., 708

18.—Street Railway—Defective Appliances—Absence of Buffers on Cars.

The plaintiff was a motorman in the employ of the defendant company and his action was brought under the Workman's Compensation Act to recover damages for injuries sustained while coupling together a street car and trailer. The main ground of negligence charged was the absence of buffers to protect the employees from injury in coupling. The plaintiff had a verdict at the trial which, on motion for a new trial, was affirmed by the Divisional Court and by the Court of Appeal for Ontario.

The Supreme Court of Canada held that there was negligence on the part of the company in not having proper appliances to prevent injury, and that a new trial had been properly refused.

The appeal was dismissed with costs.

The Toronto Railway Co. v. *Bond*, 15th May, 1895 .. .. xxiv., 715

19.—Street Railway—Accident to Workmen on Track—Contributory Negligence—New Trial—Practice.

The plaintiff, a workman in the employ of the company, was injured by a car striking him while working on the track. In an action for damages the company defended on the ground that he had not been reasonably careful in looking out for the cars. The trial Judge held that plaintiff was the cause of his own misfortune and could not hold defendants liable. This judgment was affirmed by the Divisional Court but reversed by the Court of Appeal for Ontario, which ordered a new trial.

The Supreme Court of Canada affirmed the decision of the Court of Appeal, Gwynne, J., dissenting, but on counsel for the company stating that a new trial was not desired, judgment was ordered to be entered for plaintiff with $500 damages, the amount assessed by the jury at the trial, and the appeal was dismissed with costs.

The Hamilton Street Railway Co. v. *Moran*, 20th May, 1895 .. .. xxiv., 717

20.—Action in Warranty—Joint Speculation—Partnership or Ownership Par Indivis.

W. and D. entered into a joint speculation in the purchase of real estate; each looked after his individual interests in the operations resulting from this co-partnership; no power of attorney or authority was given to enable one to act for the other, and they did not consider that any such authority existed by virtue of the relations between them; all conveyances required to carry out sales were executed by each for his undivided interest. Upon the death of W. and D., the business was continued by their representatives on the same footing, and the representatives of W. subsequently sold their interest to T. W., who purchased on behalf of, and to protect, some of the legatees of W., without any change being made in the manner of conducting the business. A book-keeper was employed to keep the books required for the various interests, with instructions to pay the moneys received at the office of the co-proprietors into a bank, whence they were drawn upon cheques bearing the joint signatures of the parties interested, and the profits were divided equally between the representatives of the parties interested, some in cash, but generally by cheque drawn in a similar way. M. N. D., who looked after the business for the representatives of D., paid diligent attention to the interests confided to him and received their share of such profits, but J. B. C., who acted in the W. interest, so negligently looked after the business as to enable the book-keeper to embezzle moneys which represented part of the share of the profits coming to the representatives of W. In an action brought by the representatives of W. to make the representatives of D. bear a share of such losses:

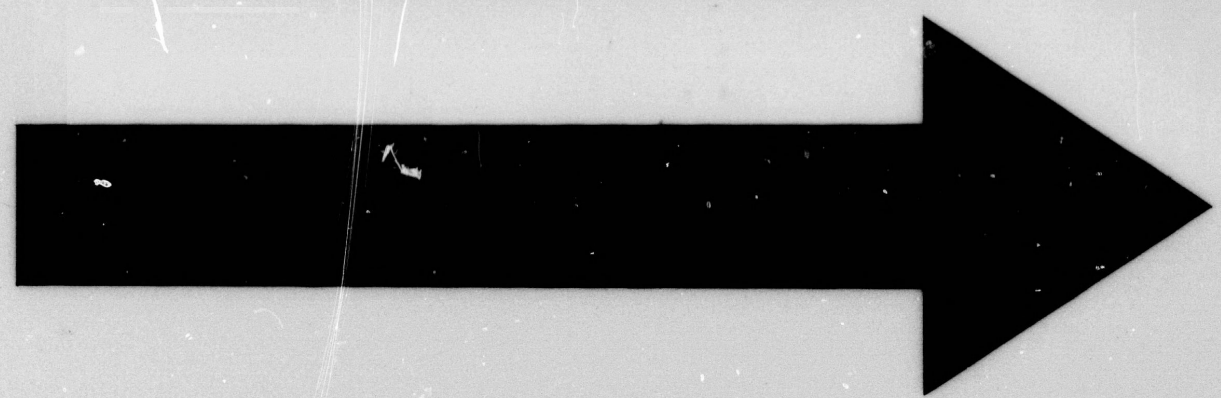
Held, affirming the judgment of the Superior Court, and of the Superior Court sitting in review, that the facts did not establish a partnership between the parties, but a mere ownership *par indivis*, and that the representatives of D. were not liable to make good any part of the loss, having by proper vigilance and prudence obtained only the share which belonged to them.

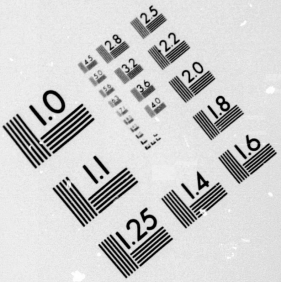
Even if a partnership existed, there would be none in the moneys paid over to the parties after a division made.

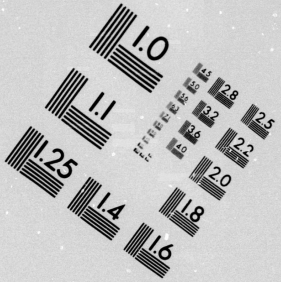
Archibald v. *deLisle*.

Baker v. *deLisle*.

Mowat v. *deLisle* .. .. xxv., 1







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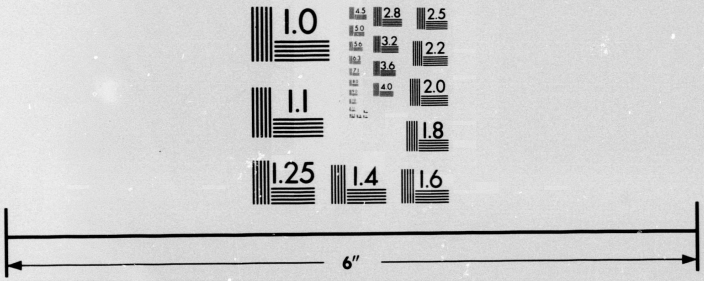

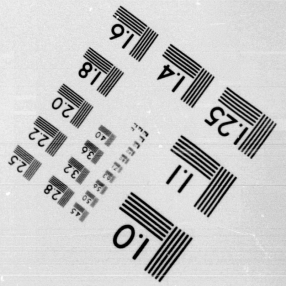

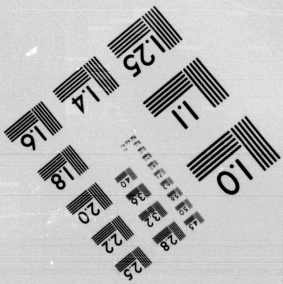

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21.—Principal and Agent—Negligence of Agent—Lending Money for Principal—Financial Brokers — Liability for Loss—Measure of Damages.

Financial brokers who invest money for a client are his agents in the transaction if they profess to be acting for him and in his interest though their remuneration may come from the borrower

An agent who invests moneys for his principal without taking proper precautions as to the sufficiency of the security is guilty of negligence, and if the value of the security proves less than the amount invested he is liable to his principal for the loss occasioned thereby.

The measure of damages in such a case is not the amount loaned with interest, but the difference between that amount and the actual value of the land.

Taschereau and Gwynne, JJ., dissenting.

Lowenburg et al. v. *Wolley* .. .. xxv., 51

22.—Master and Servant—Negligence of Servant — Deviation from Employment — Resumption — Contributory Negligence—Infant—Evidence.

A tradesman's teamster, sent out to deliver parcels, went to his supper before completing the delivery. He afterwards started to finish his work and in doing so he ran over and injured a child.

Held, affirming the decision of the Supreme Court of New Brunswick, that from the moment he had started to complete the business in which he had been engaged he was in his master's employ just as if he had returned to the master's store and made a fresh start.

The doctrine of contributory negligence does not apply to an infant of tender age. *Gardner* v. *Grace* (1 F. & F. 359), followed.

Merritt v. *Hepenstal* .. .. .. xxv., 150

23.—Master and Servant—Negligence—"Quebec Factories Act"—R. S. O. Arts. 3019-3053—C. C. Art. 1053—Civil Responsibility—Accident, Cause of — Conjecture — Evidence — Onus of Proof—Statutable Duty, Breach of—Police Regulations.

The plaintiff's husband was accidentally killed whilst employed as engineer in charge of the defendant's engine and machinery. In an action by the widow for damages the evidence was altogether circumstantial and left the manner in which the accident occurred a matter of conjecture.

Held, that, in order to maintain the action it was necessary to prove by direct evidence, or by weighty, precise and consistent presumptions arising from the facts proved, that the accident was actually caused by the positive fault, imprudence or neglect of the person sought to be charged with responsibility, and such proof being entirely wanting the action must be dismissed.

The provisions of the "Quebec Factories Act" (R. S. Q. arts. 3019 to 3053 inclusively) are intended to operate only as police regulations and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees as provided by the Civil Code.

The Montreal Rolling Mills Co. v. *Corcoran*, xxvi., 595

24. — Railway Company — Negligence — Sparks from Engine or "Hot-box"—Damages by Fire—Evidence—Burden of Proof—C. C. Art. 1053—Questions of Fact.

In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held that there was no sufficient proof that the fire occurred through the fault or negligence of the company and it was not shown that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding.

Sénésac v. *Central Vermont Railway Co.*, xxvi., 641

25.—Municipal Corporation—Snow and Ice on Sidewalks—By-law—Construction of Statute—55 Vic. c. 42, s. 531—57 Vic. c. 50, s. 13—Finding of Jury—Gross Negligence.

A by-law of the City of Kingston requires frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being severely injured brought an action for damages against the city and obtained a verdict. The Muncipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow or ice on sidewalks; notice of action in such case must be given, but may be dispensed with on the trial if the court is of opinion that there was reasonable excuse for the want of it, and that the corporation has not been prejudiced in its defence.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair; *Cornwall* v. *Derochie* (24 Can. S. C. R. 301), followed; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the Act; that "gross negligence" in the Act means very great negligence, of which the jury found the corporation guilty; and that an Appellate Court would not interfere with the discretion of the Trial Judge in dispensing with the notice of action.

The City of Kingston v. *Drennan*, xxvii., 46

25.—Landlord and Tenant—Loss by Fire—Cause of Fire—Civil Responsibility—Legal Presumption—Rebuttal of—Onus of Proof—Hazardous Occupation—Arts. 1053, 1064, 1071, 1626, 1627, 1629 C. C.

To rebut the presumption created by article 1629 of the Civil Code of Lower Canada it is not necessary for the lessee to prove the exact or probable origin of the fire or that it was due to unavoidable accident or irresistible force. It is sufficient for him to prove that he had used the premises leased as a prudent administrator (*en bon père de famille*), and that the fire occurred without any fault that could be attributed to him or to persons for whose acts he should be held responsible.

The judgment of the Court of Queen's Bench for Lower Canada affirmed, Strong, C.J., dissenting.

Murphy v. *Labbé* .. .. xxvii., 126

26.—Defective Machinery—Evidence for Jury.

T. was employed as a weaver in a cotton mill and was injured while assisting a less experienced hand, by the shuttle flying out of the loom at which the latter worked, and striking her on the head. The mill contained some 400 looms, and for every forty-six there was a man, called the "loom fixer," whose duty it was to keep them in proper repair. The evidence showed that the accident was caused by a bolt breaking by the shuttle coming in contact with it, and as this bolt served as a guard to the shuttle the latter could not remain in the loom. The jury found that the breaking of the bolt caused the accident, and that the "loom fixer" was guilty of negligence in not having examined it within a reasonable time before it broke. T. obtained a verdict, which was affirmed by the Court of Appeal.

Held, Gwynne, J., dissenting, that the "loom fixer" had not performed his duty properly; that the evidence as to negligence could not have been withdrawn from the jury; and that, as there was evidence to justify their finding, the verdict should stand.

Per Gwynne, J., that the finding of the jury that the negligence consisted in the omission to examine the bolt was not satisfactory, as there was nothing to show that such examination could have prevented the accident, and there should be a new trial.

The Canadian Coloured Cotton Mills Co. v. *Talbot* .. .. xxvii., 198

27.—Negligence—Unsafe Premises — Risk Voluntarily Incurred.

An employee of a company which had contracted to deliver coal at a school building went voluntarily to inspect the place where the coal was to be put on the evening preceding the day upon which arrangements had been made for the delivery, and was accidentally injured by falling into a furnace pit in the basement on his way to the coal-bins. He did not apply to the School Board or the caretaker in charge of the premises before making his visit.

Held, that in thus voluntarily visiting the premises for his own purposes and without notice to the occupants, he assumed all risks of danger from the condition of the premises and could not recover damages.

Rogers v. *The Toronto Public School Board*, xxvii., 448

28.—Master and Servant—Injuries Sustained by Servant—Responsibility—Contributory Negligence — Protection of Machinery.

Where an employee sustains injuries in a factory through coming in contact with machinery, the employer, although he may be in default, cannot be held responsible in damages, unless it is shown that the accident by which the injuries were caused was directly due to his neglect.

Tooke v. *Bergeron* .. .. xxvii., 567

29.—Master and Servant—Common Fault —Jury Trial—Assignment of Facts—Arts. 353 & 414 C. C. P.—Art. 427 C. P. Q.—Inconsistent Findings — Misdirection—New Trial—Pleading.

In an action to recover damages for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts sufficient to show the breach of a duty owed him by, and inconsistent with due diligence on the part of the defendant, and that the injuries were thereby occasioned; and where in such an action the jury have failed to find the defendants guilty of the particular act of negligence charged in the declaration as constituting the cause of the injuries, a verdict for the plaintiff cannot be sustained and a new trial should be granted.

Cowans et al. v. *Marshall* .. .. xxviii., 161

30.—Railways—Statute, Construction of —51 Vic. c. 29, s. 262 (D.)—Railway Crossings—Packing Railway Frogs, Wing-rails, Etc.

The proviso of the fourth sub-section of section 262 of "The Railway Act" (51 Vic. c. 29 (D.), does not apply to the fillings referred to in the third sub-section, and confers no power upon the Railway Committtee of the Privy Council to dispense with the filling in of the spaces behind and in front of the railway frogs and crossings and the fixed rails and switches during the winter months. Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 183), reversed.

Washington v. *The Grand Trunk Railway Co.*, xxviii., 184

(On appeal this decision was affirmed by the Privy Council, 24th February, 1899.)

31.—Master and Servant — Accident, Cause of—Contributory Negligence—Evidence.

In an action for damages by an employee for injuries sustained while operating an embossing and stamping press, it appeared that when the accident causing the injury occurred, the whole of the employee's hand was under the press, which was unnecessary, as only the hand as far as the second knuckle needed to be inserted for the purpose of the operation in which he was engaged. It was alleged that the press was working at undue speed; but it was proved that the speed had been increased to such extent at the instance of the employee himself, who was a skilled workman.

Held, reversing the judgment of the Court of Queen's Bench, that the injury occurred by a mere accident not due to any negligence of the employer, but solely to the heedlessness and thoughtlessness of the injured man himself, and the employer was not liable.

Burland v. *Lee* .. .. xxviii., 348

32.—Master and Servant — Evidence — Probable Cause of Accident.

Evidence which merely supports a theory propounded as to the probable cause of injuries received through an unexplained accident is insufficient to support a verdict for damages where there is no direct fault or negligence proved against the defendant and the actual cause of the accident is purely a matter of speculation or conjecture.

The Canada Paint Co. v. *Trainor*, xxviii., 352

33.—Fault of Fellow Servant—Master and Servant — Employer's Liability —Arts. 1053, 1056, C. C.

The defendants carried on the manufacture of detonating cartridges or caps made by charging copper shells with a composition of fulminate of mercury and chlorate of potash, a highly explosive mixture, requiring great care in manipulation. It is, when dry, liable to explode easily by friction or contact with flame, but has the property of burning slowly without exploding when saturated with moisture. It was the duty of defendants' foreman, twice a day, to provide a sufficient quantity of the mixture for use in his special compartment during the morning and in the afternoon, and to keep it properly dampened with water, for which purpose he was furnished with a sprinkler. It was also the foreman's duty to fill the empty shells with the fulminating mixture as they were handed to him set on end in wooden plates, and then pass them on, properly moistened, through a slot in his compartment, to a shelf whence they were removed by another employee and the charges pressed down to the bottom of the shells by means of a pressing machine worked by C., at a table near by. An explosion took place which appeared from the evidence to have originated at the pressing machine, and might have occurred either through the fulminate in the shells having been allowed to become too dry from carelessness in the sprinkling, or from an accumulation of the mixture adhering to and drying upon the metal portions of the pressing machine. It was the duty of C., the person operating the pressing machine, to keep it clean and prevent the mixture from accumulating and drying there in dangerous quantities. When

the explosion occurred, the foreman and C. and another employee were killed, but a fourth employee, who was blown outside the wreck of the building and survived, stated that the first flash appeared to come from the pressing machine, and the explosion followed immediately. The theory propounded by the plaintiff, the father of C., assumed that nothing was known of the actual cause of the explosion, nor where it in point of fact originated, but inferred from a supposed condition of things, that the fulminate had not been sufficiently dampened, and that this indicated carelessness on the part of the foreman and raised a presumption that the explosion originated through his fault. The evidence of the survivor led to the conclusion that the explosion originated through C's neglect to clean the pressing machine. There was evidence to show that the defendants had taken all reasonable precautions to diminish risk of injury to their employees in the event of an explosion, and that conformity with rules prescribed and instructions given by them to their employees for the purpose of securing their safety, would be sufficient to secure them from injury.

Held, Taschereau and King, JJ., dissenting, that as it appeared under the circumstances of the case, that the cause of the accident was either unknown or else that it could fairly be presumed to have been caused by the negligence of the person injured, whose personal representative brought the action, that there could not be any such fault imputed to the defendants as would render them liable in damages.

Dominion Cartridge Co. v. *Cairns*, xxviii., 361

34.—Landlord and Tenant—Loss by Fire — Negligence — Rebuttal of — Legal Presumption—Onus of Proof—Construction of Agreement—Covenant to Return Premises in Good Order—Art. 1629 C. C.

A steam sawmill was totally destroyed by fire during the term of the lease, whilst in the possession of and occupied by the lessees. The lease contained a covenant by the lessees "to return the mill to the lessor at the close of the season in as good order as could be expected considering the wear and tear of the mill and machinery." The lessees, in defence to the lessor's action for damages, adduced evidence to show that necessary and usual precautions had been taken for the safety of the premises, a night watchman kept there making regular rounds, that buckets filled with water were kept ready and force-pumps provided for use in the event of fire, and they submitted that, as the origin of the fire was mysterious and unknown, it should be assumed to have occurred through natural and fortuitous causes for which they were not responsible. It appeared however that the night-watchman had been absent from the part of the mill where the fire was first discovered for a much longer time than was necessary or usual for the making of his rounds, that during his absence the furnaces were left burning without superintendence, that sawdust had been allowed to accumulate for some time in a heated spot close to the furnace where the fire was actually discovered, and that, on discovering the fire, the watchman failed to make use of the water-buckets to quench the incipient flames, but lost time in an attempt to raise additional steam pressure to start the force-pumps before giving the alarm.

Held, that the lessees had not shown any lawful justification for their failure to return the mill according to the terms of the covenant; that the presumption established by article 1629 of the Civil Code, against the lessees, had not been rebutted, and that the evidence showed culpable negligence on the part of the lessees which rendered them civilly responsible for the loss by fire of the leased premises.

Murphy v. *Labbé* (27 Can. S. C. R. 126), approved and followed.

Klock v. *Lindsay*, *Lindsay* v. *Klock*, xxviii., 453

35.—Railways — Regular Depot—Traffic Facilities—Railway Crossings—Walking on Line of Railway—Trespass—Invitation—License—51 Vic. c. 29, ss. 240, 256, 273 (D.).

A passenger aboard a railway train, storm bound at a place called Lucan Crossing on the Grand Trunk Railway, left the train and attempted to walk through the storm to his home a few miles distant. Whilst proceeding along the line of the railway, in the direction of an adjacent public highway, he was struck by a locomotive engine and killed. There was no depot or agent maintained by the company at Lucan Crossing, but a room in a small building there was used as a waiting room, passenger tickets were sold and fares charged to and from this point, and, for a number of years, travellers had been allowed to make use of the permanent way in order to reach the nearest highways, there being no other passage way provided.

In an action by his administrators for damages:

Held, Taschereau and King, JJ., dissenting, that notwithstanding the long user of the permanent way in passing to and from the highways by passengers taking and leaving the company's trains the deceased could not, under the circumstances, be said to have been there by the invitation or license of the company at the time he was killed and that the action would not lie.

Grand Trunk Railway of Canada v. *Anderson et al.* .. .. xxviii., 541

36.—Master and Servant — Employer's Liability — Concurrent Findings of Fact—Contributory Negligence.

In an action by an employee to recover damages for injuries sustained there was some evidence of neglect on the part of the employers which, in the opinion of both courts below, might have been the cause of the accident through which the injuries were sustained, and both courts found that the accident was due to the fault of the defendants either in neglecting to cover a dangerous part of a revolving shaft temporarily with boards or to disconnect the shaft or stop the whole machinery while the plaintiff was required to work over or near the shaft.

Held, Taschereau, J., dissenting, that although the evidence on which the courts below based their findings of fact might appear weak, and there might be room for the inference that the primary cause of the injuries might have been the plaintiff's own imprudence, the Supreme Court of Canada would not, on appeal, reverse such concurrent findings of fact.

The George Matthews Co. v. *Bouchard*, xxviii., 580

37.—Master and Servant — Employers' Liability — Use of Dangerous Material—Insulation of Electric Wires —Cause of Death—Findings of Fact Arts. 1053, 1054 C. C.

Persons dealing with dangerous material are obliged to take the utmost care to prevent injuries being caused through their use by adopting all known devices to that end, and where there is evidence that there was a precaution which might have been taken by a company making use of electrical currents to prevent live wires causing accidents, and that this precaution was not adopted the company must be held responsible for damages.

The Citizens' Light & Power Co. v. *Lepitre*, 6th October, 1898 .. .. xxix., 1

37*a*. — Use of Dangerous Material — Evidence—Trespass.

Work on the construction of a railway was going on near the unused part of a public cemetery in connection with which were used detonating caps containing fulminate. M., a boy of fifteen years of age, in passing through the cemetery with some companions, found some of these caps lying about on the bank above the works, in front of a tool box used by one of the gangs of workmen, and put them in his pocket. Later on the same day he was scratching the fulminate end of one of them with a stick when it exploded and injured his hand. On the trial of an action against the contractors for damages, there was no direct evidence as to how the caps came to be where they were found, but it was proved that when a blast was about to take place, the workmen would hurriedly place any explosives they might have in their possession under their tool box, and then run away. It also was proved that caps of the same kind were kept in the tool box near which those in question were found by M., and were taken out and put back by the workmen as occasion might require.

Held, reversing the judgment of the Court of Appeal, that in the absence of evidence of circumstances leading to a different con lusion, the act of placing the caps where they were found could fairly be attributed to the workmen, who alone were shown to have had the right to handle them; that it was incumbent on defendants to exercise a high degree of caution to prevent them falling into the hands of strangers; that the act of M., which caused the cap to explode did not necessarily import want of due caution, and if his negligence contributed to the accident the jury should have so found; and that whether or not M. was a trespasser, was also a question for the jury, who did not pass upon it.

Makins v. *Piggott*, 21st Nov., 1898, xxix., 188

37*b*. — Sparks from Railway Engine — Rubbish on Railway Berm—Damages by Fire—Findings of Jury—Evidence — Concurrent Findings of Courts Appealed from.

In an action against a railway company for damages in consequence of plaintiffs' property being destroyed by fire alleged to be caused by sparks from an engine of the company the jury found, though there was no direct evidence of how the fire occurred, that the company negligently permitted an accumulation of grass or rubbish on their road opposite plaintiffs' property which, in case of emission of sparks or cinders would be dangerous; that the fire originated from or by reason of a spark or cinder from an engine; and that the fire was communicated by the spark or cinder falling on the com-

pany's premises and spreading to plaintiffs' property. A verdict against the company was sustained by the Court of Appeal.

Held, affirming the judgment of the latter court (25 Ont. App. R. 242), and following *Sénésac* v. *Central Vermont Railway Co.* (26 Can. S. C. R. 64); *George Matthews Co.* v. *Bouchard* (28 Can. S. C. R. 580); that the jury having found that the accumulation of rubbish along the railway property caused the damages, of which there was some evidence, and the finding having been affirmed by the trial court and Court of Appeal, it should not be disturbed by a second appellate court.

Grand Trunk Ry. Co. v. *Rainville et al.*, 21st November, 1898 .. .. xxix., 201

38.—Trespasser — Dangerous Way — Contributory Negligence—Cause of Injuries—Warning of Danger.

B. was aboard a ship on the point of departure from the port of Montreal, and was injured by tackle falling from a derrick used in stowing part of the cargo. In an action for damages the jury found that the accident was caused through imperfect hitching of the tackle, but that B. improperly remained in a dangerous position after being warned to "stand from under." The jury also found that B. was not, at the time, employed at his work and duty, but was aboard the ship with reasonable expectation of being engaged for the voyage.

Held, that B. was a trespasser; that his fault and imprudence constituted the principal and immediate cause of his injuries, and that the owner and master of the ship was not responsible in damages, under the circumstances, even if B. had any lawful, cause or right to be abroad the ship and although there may have been fault in the hitching of the tackle.

Roberts v. *Hawkins*, 14th December, 1898, xxix., 218

39.—Railway Co.—Accident at Crossing—Statutory Requirments — Notice of Approach.

See Appeal, 5.

40.—Railway Co.—Breaking of Rail—Latent Defect — Arts. 1053, 1673, 1675 C. C.

See Railways, 4.

41.—Collision at Sea—Steamship—Defective Steering Apparatus — Question of Fact.

See Appeal, 19.

42.—Master and Servant—Common Employment—Finding of Jury—Question of Fact.

See Master and Servant, 1.

43. — Action for Personal Injuries — Death of Plaintiff — Subsequent Action under Lord Campbell's Act—Evidence.

See Evidence, 3.

44. — Collision — Rule of the Road — Steamer—Sailing Vessel.

See Admiralty Law, 1.

45.—By Servants of the Crown—Injury to Property on Public Work — Liability of Crown for Tort—50-51 Vic. c. 16 (D.).

See Constitutional Law, 9.

46. — Railway Company — Carriage of Goods—Limitation of Liability—Railway Act, 1888, s. 246 (3).

See Railways, 8.

47.—Withdrawal of Case from Jury—Evidence — Reasonable Care — New Trial—Questions for the Jury.

See Evidence, 6.

48.—Railway Company—Loan of Cars—Reasonable Care—Breach of Duty — Risk Voluntarily Incurred — "Volenti Non Fit Injuria."

See Railways, 11.

49.—Jury—Answers to Questions—Railway Co. — Act of Incorporation — Change of Name.

See Railways, 12.

50.—Municipal Corporation — Repair of Streets—Liability for Non-feasance.

See Municipal Corporation, 25.

51.—Negligence—Obstruction of Street—Assessment of Damages—Questions of Fact—Action of Warranty.

See Appeal, 44.

52.—Chattel Mortgage — Mortgagee in Possession — Wilful Default — Sale under Powers—"Slaughter Sale"—Practice—Assignment for Benefit of Creditors—Revocation of.

See Sale, 4.

53.—Maritime Law—Collision—Rules of the Road — Narrow Channel—Navigation, Rules of—R. S. C. c. 79, s. 1, Arts. 15, 16, 18, 19, 21, 22 and 23—"Crossing" Ships—"Meeting" Ships "Passing" Ships—Breach of Rules—Moiety of Damages—36 and 37 Vic. (Imp.) c. 85, s. 17—Manœuvres in "Agony of Collision."

See Admiralty Law, 2.

54.—Railway Co.—Carriage of Goods—Connecting Lines—Special Contract—Loss by Fire in Warehouse—Negligence—Pleading.

See Railways, 15.

55.—Appeal — Questions of Fact—Second Appellate Court.

See Appeal, 61.

56.—Drainage — Intermunicipal Works—Damages—Extra Cost—Misapplication of Funds—Repairs—Assessment—R. S. O. (1877) c. 174—46 Vic. c. 18 (Ont.).

See Municipal Corporation, 36.

57.—Fragile Goods — Stowage—Contract Against Fault of Servants—Charter Party—Affreightment.

See Carriers, 4.

58.—Hire of Tug — Conditions — Repairs —Negligence—Compensation.

See Lease, 5.

NEGOTIABLE SECURITY.

Fraudulent Conversion—Past Due Bonds —Debentures Transferable by Delivery—Equity of Previous Holders—Estoppel—Implied Notice — Innocent Holder for Value—C. C. Arts. 1487, 1490, 2202 and 2287.

A *bonâ fide* holder acquiring commercial paper after dishonour takes subject not merely to the equities of prior parties to the paper, but also to those of all parties having an interest therein. *In re European Bank. Ex parte, Oriental Commercial Bank* (5 Ch. App. 358), followed.

Young v. *MacNider* .. .. xxv., 272

NEW TRIAL.

1.—New Trial—Improper Reception and Rejection of Evidence — Nominal Damages.

The appeals were from two decisions of the Supreme Court of New Brunswick, in favour of the respondent C., who brought his action for the price of timber supplied to S., under a written agreement. S. defended on the ground that the timber was not of the quality contracted for. The plaintiff obtained a verdict and a new trial was moved for on a great number of grounds only two of which were relied on in argument. The rule for a new trial was made absolute unless the plaintiff filed a consent to his verdict being reduced, and such consent being filed the rule was discharged and the verdict stood for the reduced amount.

Another action was brought by S. against C. for damages in not supplying timber up to the standard the contract required. In this action a verdict was given for the defendant, and a new trial was moved for, the main ground urged being that plaintiff was entitled to nominal damages at least. The court was of opinion that the plaintiff was entitled to nominal damages, but refused a new trial to enable him to have a verdict therefor. (31 N. B. Rep. 250, 265). S. appealed from both decisions to the Supreme Court of Canada

Both appeals were dismissed, the Supreme Court being of opinion that the objections to the verdicts for improper reception and rejection of evidence were properly overruled by the court below and the new trial to enable S. to recover nominal damages was properly refused.

Scammel v. *Clarke*, 1st May, 1894, xxiii., 307.

2.—New Trial—Negligence—Master and Servant—Common Fault—Jury Trial —Assignment of Facts—Arts. 353 & 414 C. C. P.—Art. 427 C. P. Q.—Inconsistent Findings — Misdirection — Pleading.

In an action to recover damages for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts sufficient to show the breach of a duty owed him by, and inconsistent with due diligence on the part of, the defendant, and that the injuries were thereby occasioned; and where in such an action the jury have failed to find the defendants guilty of the particular act of negligence charged in the declaration as constituting the cause of the injuries, a verdict for the plaintiff cannot be sustained and a new trial should be granted.

Cowans et al. v. *Marshall* .. .. xxviii., 161

3.—Appeal from Order for—Jurisdiction —Final Judgment.

See Appeal, 7.

4.—Action for Negligence — Excessive Damages—Finding of Jury.

See Negligence, 3.

6.—Action on Insurance Policy—Findings of Jury — Answers to Questions—Evidence.

See Insurance, Fire 1.

7.—Equity Suit—Construction of Statute—Persona Designata—53 Vic. c. 4, s. 85 (N. B.).

See Statute, 15.

8.—Employers' Liability Act — Injury to Workmen—Evidence.

See Negligence, 16.

9.—Improper Admission of Evidence — Objection at Trial—Relevancy.

See Evidence, 9.

10. — Negligence — Reasonable Care — Question for Jury—Withdrawal of Case from Jury—Evidence.

See Evidence, 6.

11.—Findings of Jury—Answers to Questions—Negligence—Railway Company —Act of Incorporation—Change of Name.

See Railways, 12.

NOTICE.

1. — Mortgage — Agreement to Charge Lands—Statute of Frauds—Registry.

The solicitor of the mortgagee wrote the memo. on one of his letter forms under the printed words "Dear Sir," his own name being at the bottom on the left side, and he made an affidavit, as subscribing witness, to have it registered. Lot 19 having been mortgaged to another person, one of the mortgagees of the Christopher farm brought an action to have it declared that she was entitled to a charge or lien thereon, in which action it was contended that the solicitor was not a subscribing witness but only the person to whom the letter was addressed.

Held, affirming the judgment of the Court of Appeal, that the solicitor signed the agreement as a witness and the registration was, therefore, regular, but if not, as the document was upon the registry the subsequent purchaser had actual notice by which he was bound notwithstanding the informality in the proof of execution which did not make the registration a nullity.

Held, per Taschereau, J., that the agreement did not require attestation, and if the solicitor was not a witness it should have been indorsed with a certificate by a County Court Judge as required by R. S. O. (1887) c. 114, s. 45, and it having been registered the court would presume that such certificate had been obtained.

Rooker v. *Hoofstetter* .. .. .. xxvi., 41

2. — Appeal — Dismissal for Want of Appearance — Application to Reinstate—Notice—Practice—Costs.

The appeal had been regularly inscribed on the roll for hearing at the May sittings of the Supreme Court of Canada, and on 18th May, 1898, the case being called in the order in which it appeared upon the roll, no person appeared on behalf of the appellant. Counsel appeared for the respondent and asked that the appeal should be dismissed for want of prosecution. The court referred to the fact that the case had been called in its proper place on the roll on the the previous day and allowed to stand over because counsel were not present on the part of the appellant, and the appeal was dismissed with costs.

On 20th May, 1898, application by motion was made on behalf of the appellant to have the appeal reinstated and restored to its place on the roll for hearing on such terms as the court might deem appropriate, the ground stated for requesting such indulgence being that counsel for the appellant were under a misapprehension as to the time when the hearing was to take place. The motion was opposed by counsel for the respondent, who objected that proper notice of the motion had not been given as required by the rules of practice.

The court refused to hear the motion or to make an order staying the issue of the certificate of the judgment already rendered dismissing the appeal, but under the circumstances the motion was dismissed without costs.

The Hall Mines (Limited) v. *Moore*, 20th May, 1898.

3.—Will—Executors and Trustees under —Breach of Trust by one—Inquiry—Dealing with Assets as Executor or Trustee.

See Trusts, 2.

4.—Guarantee Policy—Honesty of Employee—Notice of Defalcation.

See Surety, 3.

5.—Bailees—Common Carriers—Express Company Receipt for Money Parcel—Conditions Precedent — Formal Notice of Claim — Pleading—Money Counts—Special Pleas.

See Action, 5.

6.—Registry Laws—Registered Deed — Priority over Earlier Grantee—Postponement.

See Registry Laws, 4.

7.—Debtor and Creditor — Composition and Discharge—Acquiescence in—New Arrangement of Terms of Settlement—Waiver of Time Clause—Principal and Agent—Deed of Discharge — Notice of Withdrawal from Agreement—Fraudulent Preference.

See Composition and Discharge.

8. — Principal and Agent — Agent's Authority—Representation by Agent —Principal Affected by—Advantage to Other Than Principal—Knowledge of Agent—Constructive Notice.

See Principal and Agent, 6.

9.—Principal and Surety — Guarantee Bond — Default of Principal—Non-disclosure by Creditor.

See Principal and Surety, 4.

10.—Negligence—Unsafe Premises — Risk Voluntarily Incurred.

See Negligence, 27.

11. — Cancellation of Contract — Gas Supply—Shut off for Non-payment of Gas Bill on other Premises—Construction of Contract — Construction of Statute.

See Gas Company.

12.—Appeal—Question of Local Practice — Inscription for Proof and Hearing—Peremptory List—Requete Civile.

See Appeal, 84.

13.—Condition in Fire Insurance Policy —Notice of Additional Insurance—Loss Before Knowledge of Acceptance—Duty of Insured.

See Insurance, Fire, 7.

14.—Accident Insurance—Condition in Policy—Notice—Condition Precedent —Action.

See Insurance, Accident, 2.

NOVATION.

1.—Unpaid Note—Security for by Deed—Interruption of Prescription—Art. 2264 C. C.

See Prescription, 1.

2.—Vendor and Purchaser—Agreement for Sale of Lands—Assignment—Principal and Surety — Deviation from Terms of Agreement—Giving Time—Creditor Depriving Surety of Rights—Secret Dealings with Principal—Release of Lands—Arrears of Interest — Novation — Discharge of Surety.

See Principal and Surety, 3.

NUISANCE.

1.—Livery Stable—Offensive Odours—Noise of Horses.

Though a livery stable is constructed with all modern improvements for drainage and ventilation, if offensive odour therefrom, and the noise made by the horses are a source of annoyance and inconvenience to the neighbouring residents the proprietor is liable in damages for the injury caused thereby. Gwynne, J., dissenting.

Drysdale v. *Dugas* .. .. .. xxvi., 20

2. — Constitutional Law — Navigable Waters—Title to Bed of Stream—User—Obstruction to Navigation — Public Nuisance—Balance of Convenience.

An obstruction to navigation cannot be justified on the ground that the public benefit to be derived from it outweighs the inconvenience it causes. It is a public nuisance though of a very great public benefit, and the obstruction of the slightest possible degree.

The Queen v. *Moss* .. .. xxvi., 322

3.—Municipal Corporation — Highway—Encroachment upon Street—Negligence—Obstruction of Show-window — Municipal Officers — Action for Damages—Misfeasance During Prior Ownership — Nonfeasance — Statutable Duty.

An action does not lie against a municipal corporation for damages in respect of mere non-feasance, unless there has been a breach of some duty imposed by law upon the corporation.—*The Municipality of Pictou* v. *Geldert* (1893) A. C. 524, and *The Municipal Council of Sydney* v. *Bourke* (1895) A. C. 433, followed.

An action does not lie against a municipal corporation by the proprietor of lands for damages in respect thereof, through the mistake or misfeasance of the corporation or its officers, alleged to have occurred prior to the acquisition of his title thereto.

A municipal corporation is not civilly responsible for acts of its officers or servants other than those done within the scope of their authority as such.

City of Montreal v. *Mulclair et al.*, xxviii., 458

4.—Street Obstruction—Street Railway—Height of Rails—Statutory Obligation—Accident to Horse.

See Negligence, 4.

5.—Municipal Corporation—Public Market—Licensing Traders and Hucksters—Obstructing Streets and Sidewalks—Loss of Rents—Damages.

See Municipal Corporation, 35.

NULLITY.

1.—Assignment — Prete-nom — Notice — Registration — Action to Annul — Parties in Interest.

The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties.

Guertin v. *Gosselin* .. .. .. xxvii., 514

2.—Sale—Donation in Form of—Gifts in Contemplation of Death — Mortal Illness of Donor—Presumption of Nullity—Validating Circumstances—Dation en Paiement—Arts. 762, 989 C. C.

During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee, and the consideration acknowledged by the deed was never paid.

Held, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void under the provisions of article 762 of the Civil Code, as the circumstances tended to show that the transaction was actually for good consideration (*dation en paiement*), and consequently legal and valid.

Valade v. *Lalonde* .. .. xxvii., 551

3.—Evidence—Estoppel—C. C. Arts. 311 and 1243.

See Admissions.

4.—Assignment for Benefit of Creditors—Preferences—Moneys Paid under Voidable Assignments—Liability of Assignee.

See Assignment, 3.

5.—Title to Lands—Sheriff's Deed—Limitation of Actions — Equivocal Possession.

See Evidence, 30.

6.—Life Insurance—Wagering Policy—Waiver—Estoppel—14 Geo. III., c. 48 (Imp.)—Arts. 2480, 2590 C. C.

See Insurance, Life, 3.

OPPOSITION.

1.—Appeal — Jurisdiction — Judicial Proceeding—Opposition to Judgment.

An opposition to judgment under Art. 484 C. C. P. is a "judicial proceeding" within the meaning of sec. 29 of "The Supreme and Exchequer Courts Act," and there is an appeal to the Supreme Court if, at the filing of the opposition, the principal and interest due under the judgment sought to be annulled amount to $2,000, where such appeal depends upon the amount in controversy.

Trucotte v. *Dansereau* .. .. .. xxvi., 578

2.—Service of Action—Judgment by Default — Opposition to Judgment — Reasons of — "Rescissoire" joined with "Rescindant"—Arts. 16, 89 *et seq.*, 483, 489 C. C. P.—False Return of Service.

No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.

The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada (respecting oppositions to judgment) relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered, for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment by opposition, and have it set aside notwithstanding that more than a year and a day may have elapsed from the rendering

of the same, and without alleging or establishing that he has a good defence to the action on the merits.

An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescissoire* had thus been improperly joined with the *rescindant*.

Turcotte v. *Dansereau* .. .. .. xxvii., 583

3. — Appeal — Jurisdiction — Amount in Controversy — Opposition Afin de Distraire—Judicial Proceeding—Demand in Original Action—R. S. C. c. 135, s. 29.

An opposition *afin de distraire*, for the withdrawal of goods from seizure, is a "judicial proceeding" within the meaning of the twenty-ninth section of "The Supreme and Exchequer Courts Act," and on an appeal to the Supreme Court of Canada, from a judgment dismissing such opposition, the amount in controversy is the value of the goods sought to be withdrawn from seizure and not the amount demanded by the plaintiff's action or for which the execution issued. *Turcotte* v. *Dansereau* (26 Can. S. C. R. 548), and *McCorkill* v. *Knight* (3 Can S. C. R. 233; Cas. Dig., 2 ed. 694), followed: *Champoux* v. *Lapeirre* (Cas. Dig. 2 ed. 426), and *Gendron* v. *McDougall* (Cas. Dig. 2 ed. 429), discussed and distinguished.

King et al. v. *Dupuis dit Gilbert*, xxviii., 388

4. — Appeal — Collocation and Distribution—Hypothecs—Arts. 20, 144 and 761 C. C. P.—Assignment—Notice—Registration — Prete-nom—Action to Annul Deed—Parties in Interest—Incidental Proceedings.

See Judgment of Distribution.

ORDINANCES.

See Statutes.

OWNERSHIP.

Joint Speculation — Partnership or Ownership Par Indivis.

See Partnership, 4.

PARDONING POWER.

Representative of Crown—Conferring Prerogative Upon—Legislative Authority.

Quære: Is the power of conferring by legislation upon the representative of the Crown, such as a Colonial Governor, the prerogative of pardoning in the Imperial Parliament, only, or, if not, in what legislature does it reside?

Attorney-General of Canada v. *Attorney-General of Ontario* .. .. xxiii., 458

And *see* Constitutional Law.

PARTIES.

1. — Action for Account — Provisional Possession—Executors.

See Executors, 2.

2.—Assignment—Hypothecs—Prete-nom — Notice—Action to Annul Deed.

See Nullity, 1.

PARTITION.

1.—Partnership — Division of Assets — Art. 1898 C. C.—Mandate—Debtor and Creditor—Account.

See Partnership, 8.

2.—Will — Construction of—Donation — Substitution—Partition, Per Stirpes or Per Capita—Usufruct—Alimentary Allowance—Accretion Between Legatees.

See Substitution, 1.

PARTNERSHIP.

1.—Dissolution of Partnership—Married Woman—Benefit Conferred During Marriage—Simulation—Fraud.

On 10th April, 1886, J. S. M., a retired partner of the firm of McL. & B., composed of himself and W. M., his brother, agreed to leave his capital, for which he was paid interest, in the new firm to be constituted of the said W. M. and one R., an employee of the former firm, and that such capital should rank after the creditors of the old firm had been paid in full. The new firm was to carry on business under the same firm name up to 31st Dec. 1889. J. S. M. died on 18th Nov. 1886. His wife, separate as to property, had an account in the books of both firms. On 16th April, 1890, an agreement was entered into between the new firm and the estate of J. S. M., and his widow, by which a large balance was admitted to be due by them to the estate and the widow. The new firm was declared insolvent in January, 1891. Claims were filed by the widow and the estate of J. S. M. against the insolvents, and the Merchants Bank of Canada contested them on the

grounds, *inter alia*, that they had been creditors of the firm and continued to advance to the new firm on the faith of the agreement of April, 1886, that the widow's moneys formed part of the capital of J. S. M., and that the dissolution was simulated. (Q. R. 2 Q. B. 431).

The Supreme Court of Canada reversed the judgment of the Court of Queen's Bench for Lower Canada, (appeal side), and restored the judgment of the Superior Court, District of Montreal, Fournier and King, JJ., dissenting, and

Held, that the dissolution of the partnership was simulated; that the moneys which appeared to be owing to the widow, after having credited her with her own separate moneys, were in reality moneys deposited by her husband in order to confer upon her, during marriage, benefits contrary to law, and that the bank had a sufficient interest to contest these claims, the transaction being in fraud of their rights as creditors.

The Merchants Bank of Canada v. *McLachlan.*
The Merchants Bank of Canada v. *McLaren*, 2nd April, 1894 .. .. xxiii., 143

2.—Dissolution—Winding-up—Extra Services of one Partner—Contract to Pay for.

If the business of winding up a partnership concern is apportioned between the partners and each undertakes to perform the share allotted to him, one of them cannot afterwards claim to be paid salary or other remuneration merely for the reason that his share of the work has been more laborious or difficult than that performed by his co-partner, in the absence of any express agreement to that effect, or one to be implied from the conduct of the parties.

Liggett v. *Hamilton* .. .. .. xxiv., 665

3.—Retired Partner — Continuance of Firm Name—Notice of Dissolution—Promissory Note—Bill Heads—New Business.

The action was against the defendant, S. Wigle, as a member of the firm of S. Wigle & Son, on promissory notes made by said firm in favour of plaintiff. The defence was that the defendant had retired from the firm long before the notes were given, and although his son had carried on the business under the name of S. Wigle & Son, he had no interest in it; also that at the most he could only be liable in respect to the business of a general country store, which was the business of the firm before he withdrew, and not for that of buying and selling real estate and investing in securities, which his son alone had carried on and in respect of which the notes in question were given. The courts below held that public notice of dissolution of the partnership between defendant and his son had not been given; that defendant was aware that his name still appeared as a member of the firm on the bill-heads and in other ways; that he was aware of the general nature of the new business carried on by his son in the firm name, and that he was, therefore liable on the notes.

The Supreme Court of Canada affirmed the judgment of the Court of Appeal for Ontario and dismissed the appeal with costs.

Wigle v. *Williams*, 6th May, 1895, xxiv., 713

4.—Joint Speculation—Partnership or Ownership Par Indivis.

W. & D. entered into a joint speculation in the purchase of real estate; each looked after his individual interests in the operations resulting from this co-partnership; no power of attorney or authority was given to enable one to act for the other, and they did not consider that any such authority existed by virtue of the relations between them: all conveyances required to carry out sales were executed by each for his undivided interest. Upon the death of W. and D., the business was continued by their representatives on the same footing, and the representatives of W. subsequently sold their interest to T. W., who purchased on behalf of, and to protect, some of the legatees of W., without any change being made in the manner of conducting the business. A book-keeper was employed to keep the books required for the various interests, with instructions to pay the moneys received at the office of the co-proprietors into a bank, whence they were drawn upon cheques bearing the joint signatures of the parties interested, and the profits were divided equally between the representatives of the parties interested, some in cash, but generally by cheques drawn in a similar way. M. N. D., who looked after the business of the representatives of D., paid diligent attention to the interests confined to him and received their share of such profits, but J. C. B., who acted in the W. interest, so negligently looked after the business as to enable the book-keeper to embezzle moneys which represented part of the share of the profits coming to the representatives of W. In an action brought by the representatives of W. to make the representatives of D. bear a share of such losses:

Held, affirming the judgment of the Superior Court, and of the Superior Court sitting in review, that the facts did not estab-

lish a partnership between the parties, but a mere ownership *par indivis*, and that the representatives of D. were not liable to make good any part of the loss, having by proper vigilance and prudence obtained only the share which belonged to them. Even if the partnership existed, there would be none in the moneys paid over to the parties after a division made.

Archibald v. *deLisle.*

Baker v. *deLisle.*

Mowat v. *deLisle* .. .. xxv., 1

5.—Judicial Abandonment—Dissolution—Composition—Subrogation—Confusion of Rights—Compensation—Arts. 772 and 778 C. C. P.

A partner in a commercial firm which made a judicial abandonment was indebted to the firm at the time of abandonment in a large amount overdrawn upon his personal account. Subsequently he made and carried out a composition with the creditors of the firm, and with the approval of the court the curator transferred to him, by an assignment in authentic form, "all the assets and estate generally of the said late firm," * * "as they existed at the time the said curator was appointed." At the same time the creditors discharged both him and his partners from all liability in respect to the partnership.

Held, affirming the decision of the court below, that the effect of the judicial abandonment was to transfer to the curator not only the partnership estate, but also the separate estate of each partner as well as the partner's individual rights as between themselves.

Held, reversing the decision of the court below, Strong, C.J., and Taschereau, J., dissenting, that the assignment of the estate by the curator and the discharge by the creditors, taken together, had the effect of releasing all the partners from the firm debts, but vested all the rights which had been transferred by the abandonment in the transferee personally and could not revive the individual rights of the partners as between themselves, and that, in consequence, any debt owing by the transferee to the partnership at the time of the abandonment became extinguished by confusion.

McLean v. *Stewart* .. .. xxv., 225

6.—Judgment Against Firm—Liability of Reputed Partner—Action on Judgment.

Where promissory notes are signed by a firm as makers, a person who holds himself out to the payees as a member of such firm, though he may not be so in fact, is liable as a maker.

In an action upon a promissory note against M. I. & Co., as makers, and J. I. as indorser, judgment was rendered by default against the firm, and a verdict was found in favour of J. I. as it appeared by the evidence that he had indorsed without consideration for the accomodation of the holders, and upon an agreement with them that he should not be held in any manner liable upon the note.

Held, in a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favour, the said agreement meaning that he was not to be liable either as a maker or indorser.

Isbester v. *Ray, Street & Co.* .. xxvi., 79

7.—Will—Legacy—Bequest of Partnership Business—Acceptance by Legatee—Right of Legatee to an Account.

J. and his brother carried on business in partnership for over thirty years and the brother having died his will contained the following bequest: "I will and bequeath unto my brother J., all my interest in the business of J. & Co., in the said City of St. Catharines, together with all sums of money advanced by me to the said business at any time, for his own use absolutely forever, and I advise my said brother to wind up the said business with as little delay as possible."

Held, in a subsequent action on the judg- Appeal, that J., on accepting the legacy was under no obligation to indemnity the testator's estate against liability for the debts of the firm in case the assets should be insufficient for the purpose and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency.

Robertson v. *Junkin* .. .. .. xxvi., 192

8.—Partnership—Division of Assets—Art. 1898 C. C.—Mandate — Debtor and Creditor—Account.

In the Province of Quebec, when there is no other arrangement between the partners, the partition of the property of a commercial partnership must be made according to the rules laid down in the Civil Code in relation to the partition of successions, in so far as they can be made to apply

Upon the dissolution of a partnership, where one of the partners has been entrusted with the collection of moneys due as the

mandatory of the others, any of his co-partners may bring suit against him directly either for an account under the mandate, or for money had and received.

Lefebvre v. *Aubry* .. .. xxvi., 602

8*a*. — Accounts — Stated and Settled Account—Estoppel—Managing Partner.

One of the two partners constituting a firm had the sole management and control of its affairs, the other lacking business capacity. The managing partner at intervals presented statements of the business to his co-partner, who signed them on being assured of their correctness, and in 1891 mutual releases of all claims and demands were executed by each, based on the statements so furnished by the active partner. In an action against the latter to have these releases set aside and the accounts reopened, it was found at the trial, on the evidence of an accountant who had examined the books of the firm, that a large loss would result to the plaintiff if the accounts were maintained as settled, and the Judge made a reference to a Master to take the accounts. On appeal from his judgment the reference was restricted to certain specified items.

Held, reversing the judgment of the Court of Appeal for Ontario and restoring that of the trial Judge, but varying it so as to make the inquiry begin at a date beyond which the plaintiff did not desire to go, that all it was necessary to establish in order to set aside the releases pleaded and to open the accounts was the fact that in the accounts as settled there were such errors or mistakes as would inflict material injustice upon the plaintiff if the accounts should be held to be closed.

The appeal was allowed with costs.

West v. *Benjamin*, 14th Dec., 1898, xxix., 282.

9.—Dissolution — Terms of—Change of Relations — Principal and Surety—Discharge of Principal.

See Mortgage, 3.

10.—Insurance of Members—Registered Declaration — Evidence to Contradict.

See Evidence, 8.

11.—Interest in Partnership Lands—Dealings Between Partners—Laches and Acquiescence.

See Statute of Limitations, 1.

12.—Real Estate Transaction—Signification of Transfer—Condition Precedent to Right of Action—Act of Resiliation.

See Signification.

13.—Construction of Statute—20 & 21 Vic. c. 54, s. 12 (Imp.)—Criminal Prosecution—Embezzlement of Trust Funds—Suspension of Civil Remedy—Stifling Prosecution—Partnership.

See Criminal Law, 6.

PATENT OF INVENTION.

1. — Combination — Old Elements — New and Useful Result—Previous Use.

In an application for a patent the object of the invention was stated to be the connection of a spring tooth with the drag-bar of a seeding machine and the invention claimed was "in a seeding machine in which independent drag-bars are used a curved spring tooth, detachably connected to the drag-bar in combination with a locking device arranged to lock the head block to which the spring tooth is attached, substantially as and for the purpose specified." In an action for infringement of the patent it was admitted that all the elements were old but it was claimed that the substitution of a curved spring tooth for a rigid tooth was a new combination and patentable as such.

Held, affirming the decision of the Court of Appeal, Gwynne, J., dissenting, that the alleged invention being the mere insertion of one known article in place of another known article was not patentable. *Smith* v. *Goldie* (9 Can. S. C. R. 46), and *Hunter* v. *Carrick* (11 Can. S. C. R. 300), referred to.

Wisner v. *Coulthard* .. .. .. xxii., 178

2.—Patent of Invention—Novelty—Infringement.

C. & Co., were assignees of a patent for a check book used by shopkeepers in making out duplicate accounts of sales. The alleged invention consisted of double leaves, half being bound together and the other half folded in as fly-leaves, with a carbonized leaf bound in next the cover and provided with a tape across the end. What was claimed as new in this invention was the device, by means of the tape, for turning over the carbonized leaf without soiling the fingers or causing it to curl up. H. made and sold a similar check book with a like device, but instead of the tape the end of the carbonized leaf, for about half an inch, was left without carbon and the leaf was turned over by means of this margin. In an action by C. & Co. against H. for infringement of their patent.

Held, affirming the decision of the Exchequer Court, that the evidence at the trial showed the device for turning over the blank

leaf without soiling the fingers to have been used before the patent of C. & Co. was issued, and it was therefore not new; that the only novelty in the said patent was in the use of the tape, and that using the margin of the paper instead of the tape was not an infringement.

Carter & Co. v. *Hamilton* .. .. xxiii., 172

3. — CANADIAN PATENT — EXPIRATION OF FOREIGN PATENT — CONSTRUCTION OF STATUTE—R. S. C. c. 61, s. 8—55 & 56 VIC. c. 24, s. 1.

The Exchequer Court of Canada (6 Ex. C. R. 55), declared a certain patent to be a good valid and subsisting patent, and that it had been infringed by the defendants and held that, the expression "any foreign patent" occurring in the concluding clause of the eighth section of "The Patent Act," must be limited to foreign patents in existence when the Canadian patent was granted.

On appeal, the Supreme Court of Canada affirmed the judgment of the Exchequer Court, and dismissed the appeal with costs.

Dreschel et al. v. *The Auer Incandescent Light Manufacturing Co.*, 14th June, 1898, xxviii., 608

4.—PATENT OF INVENTION—TRANSFER OF INTEREST IN PROMISSORY NOTE GIVEN FOR—BILLS OF EXCHANGE ACT, 53 VIC c. 33, s. 30, s.-s. 4.

See Promissory Note, 3.

5.—PATENT OF INVENTION—MANUFACTURE AND SALE UNDER—FAILURE OF PATENT—GUARANTEE.

See Guarantee, 2.

6.—STATUTE, CONSTRUCTION OF — PATENT OF INVENTION—EXPIRATION OF FOREIGN PATENT—"THE PATENT ACT," R. S. C c. 61, s. 8—55 & 56 VIC. c. 24, s. 1.

See Statute, 43.

7.—APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY—AFFIDAVITS—CONFLICTING AS TO AMOUNT—THE EXCHEQUER COURT ACTS—50 & 51 VIC. c. 16, ss. 51-53 (D.)—54 & 55 VIC. c. 26, s. 8—THE PATENT ACT—R. S. C. c. 61, s. 36.

See Appeal, 71.
See Practice, 40.

PATERNITY.

See Appeal, 70.
" Alimentary Allowance, 1, 2, 4.

PAYMENT.

1.—APPROPRIATION OF PAYMENTS—IMPUTATION OF PAYMENT—REFERENCE TO TAKE ACCOUNT.

See Principal and Surety, 1.

2. — APPROPRIATION IN PROPORTIONATE RATIO — VENDOR AND PURCHASER — AGREEMENT FOR SALE OF LAND — ASSIGNMENT BY VENDEE — PRINCIPAL AND SURETY—DEVIATION FROM TERMS OF AGREEMENT — GIVING TIME — CREDITOR DEPRIVING SURETY OF RIGHTS—SECRET DEALINGS WITH PRINCIPAL—RELEASE OF LANDS—ARREARS OF INTEREST—NOVATION—DISCHARGE OF SURETY.

See Principal and Surety, 3.

3.—DEBTOR AND CREDITOR—PAYMENT BY DEBTOR — APPROPRIATION—PREFERENCE —R. S. O. (1887) c. 124.

See Appropriation of Payments, 1.

4.—DEBTOR AND CREDITOR—SECURITY FOR DEBT—SECURITY REALIZED BY CREDITOR—APPROPRIATION OF PROCEEDS—RES JUDICATA.

See Banking, 4.

5.—MINES AND MINERALS—LEASE OF MINING AREAS—RENTAL AGREEMENT—R. S. N. S. (5 SER.) c. 7—52 VIC. c. 23 (N. S.).

See Lease, 2.

6.—SALE—DONATION IN FORM OF—MORTAL ILLNESS OF DONOR—NULLITY—DATION EN PAIEMENT—ARTS. 762, 989 C. C.

See Sale, 9.

PEACE OFFICER.

CRIMINAL CODE, S. 575—PERSONA DESIGNATA —OFFICERS DI FACTO AND DE JURE—CHIEF CONSTABLE — COMMON GAMING HOUSE—CONFISCATION OF GAMBLING INSTRUMENTS, MONEY, ETC.

See Constable, 1.

PENSION ALIMENTAIRE.

See Alimentary Allowance.

PENSION DE RETRAITE.

COMMUTATION—TRANSFER OR CESSION—R. S. Q. ARTS. 676 TO 691.

D. a retired employee of the Government of Quebec in receipt of a pension under arts. 676 and 677 R. S. Q., surrendered said pension for a lump sum to the Government,

and subsequently he and his wife brought an action to have it revived and the surrender cancelled. By art. 690 R. S. Q. the pension or half pension is neither transferable nor subject to seizure, and by art. 683, the wife of D. on his death, would have been entitled to an allowance equal to one-half of his pension.

Held, reversing the decision of the Court of Review, Strong, C.J., and Sedgewick, J., dissenting, that D. after his retirement was not a permanent official of the Government of Quebec, and the transaction was not therefore, a resignation by him of office and a return by the Government, under art. 688, of the amount contributed by him to the pension fund, that the policy of the legislation in arts. 685 and 690 is to make the right of a retired official to his pension inalienable even to the Government; that D.'s wife had a vested interest jointly with him during his life in the pension and could maintain proceedings to conserve it; and therefore that the surrender of the pension should be cancelled.

Dionne v. *The Queen* .. .. .. xxiv., 451

PETITION OF RIGHT.

1.—Contract for Public Work—Extras—Final Certificate—Pleading.

See Contract, 5.

2.—Railway Subsidy — Application — Discretion of Crown—Trust.

See Constitutional Law, 6.

3.—Constitutional Law—Powers of Executive Councillors — "Letter of Credit" — Obligations Binding on Provincial Legislatures—Government Expenditures — Negotiable Instrument—"Bills of Exchange Act," 1890—"The Bank Act," R. S. C. c. 120.

See Constitutional Law, 11.

PLEADING.

1.—Sufficient Traverse of Allegation by Plaintiff—Objection First Taken on Appeal.

The plaintiff by his statement of claim alleged a partnership between two defendants, one being married whose name on a re-arrangment of the partnership was substituted for that of her husband without her knowledge or authority.

Held, reversing the judgment of the court below that a denial by the married woman that "on the date alleged or at any other time she entered into partnership with the other defendant" was a sufficient traverse of plaintiff's allegation to put the party to proof of that fact.

Held, also, that an objection to the sufficiency of the traverse would not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient.

Mylius v. *Jackson* .. .. .. xxiii., 485

2.—Signification of Transfer — Issue—Defense au Fonds en Fait.

The want of signification of a transfer or sale of a debt as a bar to an action by the transferee is put in issue by a *defense au fonds en fait.*

Murphy v. *Bury* .. .. xxiv., 668

3.—Bailees—Common Carriers — Express Company—Receipt for Money Parcel — Conditions Precedent — Formal Notice of Claim—Pleading—Money Had and Received—Special Pleas—"Never Indebted."

An express company gave a receipt for money to be forwarded with the condition indorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed. *Held*, that in an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted," put in issue all material facts necessary to establish the plaintiff's right of action.

The Northern Pacific Express Company v. *Martin et al.* .. .. xxvi., 135

4.—Res Judicata—Defence by—Judicature Act.

Under the Judicature Act of Ontario *res judicata* cannot be relied on as a defence unless specially pleaded.

Cooper v. *Molson's Bank* .. .. xxvi., 611

5. — Railway Company — Carriers — Connecting Lines — Special Contract — Loss by Fire—Negligence.

In a statement of claim, to anticipate and reply to matters of defence is a highly improper practice.

The Lake Erie and Detroit Railway Co. v. *Sales* .. .. xxvi., 663

6.—Sheriff—Trespass—Sale of Goods by Insolvent—Bona Fides—Judgment of Inferior Tribunal — Estoppel — Bar to Action—Res Judicata—Fraudulent Preferences—Pleading.

K. was a trader and in insolvent circumstances when he sold the whole of his stock in trade to D. At the time of this sale D. was aware that two of K.'s creditors had recovered judgments against him. The sheriff afterwards seized the goods so sold, under executions issued upon judgments subsequently obtained, and upon an interpleader issue tried in the County Court the jury found that K. had sold the goods with intent to prefer the creditors who held the prior judgments, but that D. had purchased in good faith and without knowing of such intention on the part of the vendor. Judgment was thereupon entered against D. in the County Court and the judgment was affirmed by the Supreme Court of British Columbia, *en banc*.

In an action afterwards brought by D. against the sheriff for trespass in seizing the goods he obtained a verdict, which was however, set aside by the court *en banc*, a majority of the Judges holding that the County Court judgment was a complete bar to the action.

On appeal to the Supreme Court of Canada:—

Held, reversing the judgment of the Supreme Court of British Columbia that as the evidence showed that the goods had been purchased in good faith by D. for his own benefit, the sale was not void under the statute respecting fraudulent preferences; that the County Court judgment, being a decision of an inferior tribunal of limited jurisdiction could not operate as a bar in respect of a cause of action in the Supreme Court, beyond the jurisdiction of the County Court, and further, that even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel, by a plea setting up in detail all the facts necessary to constitute the estoppel, and that from the evidence in the case it appeared that no such estoppel could have been established. Taschereau, J., dissented.

Davies v. *McMillan*, 1st May, 1893.

7.—New Matter Set up in Reply—Failure to Demur—Ultra Petita—Issues Joined—Estoppel.

Where the plaintiff has supplemented his claim by setting up new matter in reply, and the defendant has failed to demur to the reply or object to evidence being adduced upon the issues generally, it is too late afterwards to take objection on the ground that, if the plaintiff had any other claim than the one sued for, it should have been set forth in the declaration. *Gilbert* v. *Lionais* (7 R. L. 339), referred to. Judgment of the Superior Court, sitting in Review, at Montreal, affirmed by the Supreme Court of Canada.

The Kingston Fowarding Co. v. *The Union Bank of Canada*, 9th December, 1895.

8. — Pleading — Estoppel — Failure to Deny Allegation in Statement of Claim—Amendment of Defence.

An acceptance which had been discharged by an agreement between the drawer and the acceptor, was subsequently put in suit by the cashier of a bank to which it had been endorsed, and the acceptor was obliged to pay the same. He then brought action against the drawer to recover the amount so paid, alleging that the acceptance was indorsed as mentioned. On an appeal to the Supreme Court of Nova Scotia: It was held, per Graham, C.J., and Henry, J., that the defendant having neglected to reply to the paragraph in the statement of claim, alleging the endorsement, was estopped from denying it; and, per Meagher, J., that the defendant was entitled to amend his defence in that behalf, and that there should be a new trial. (28 N. S. Rep. 210).

On appeal to the Supreme Court of Canada the judgment was affirmed.

Cox v. *Seeley*, 6th May, 1896.

9. — Joint Stock Company — Irregular Organization — Subscription for Shares—Withdrawal — Surrender — Forfeiture — Duty of Directors — Powers — Cancellation of Stock — Ultra Vires—"The Companies Act"—"The Winding-up Act" — Contributories—Construction of Statute.

After the issue of an order for the winding-up of a joint stock company incorporated under "The Companies Act," (R. S. C. c. 119). a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company as, under the provisions of the Act, such grounds may be taken only upon direct proceedings at the instance of the Attorney-General.

The powers given directors of a joint stock company under "The Companies Act," (R. S. C. c. 119), as to forfeiture of shares for non-payment of calls, are intended to be exercised only when the circumstances of the

shareholder render it expedient in the interests of the company, and they cannot be employed for the benefit of the shareholder.

Common v. *McArthur*, 14th December, 1898, xxix., 239

10.—Petition of Right—Contract for Public Work — Final Certificate—Extras—Certificate not Pleaded.

See Contract, 5.

11.—Defense en Fait—Status of Plaintiff—Special Denial—Art. 144 C. C. P.

See Practice, 13.

PLEDGE.

1.—Trustees and Administrators—Fraudulent Conversion—Past Due Bonds, Transfer of—Negotiable Security—Commercial Paper — Debentures Transferable by Delivery—Equity of Previous Holders—Art. 2287 C. C.—Estoppel—Brokers and Factors—Pledge — Implied Notice — Duty of Pledgee to Make Inquiry—Innocent Holder for Value—Arts. 1487, 1490 and 2202 C. C.

Quebec Turnpike Trusts bonds issued under special Acts and Ordinances (Rev. Stats. Que., 1888, Sup. p. 505), are payable to bearer and transferable by delivery. Certain of these bonds belonging to the estate of the late D. D. Young, had been used as exhibits and marked as such in the case of *Young* v. *Rattray*, and having been afterwards lost were advertised for in a newspaper in Quebec in the year 1882. About ten years afterwards W., who was the agent and administrator of the estate and had the bonds in his possession as such, pledged them to a broker for advances on his own account, the bonds being then long past due, but payment being provided for under the above cited statutes.

Held, affirming the judgment of the Court of Queen's Bench, Fournier and Taschereau, JJ., dissenting, that neither the advertisement nor the marks upon the bonds, nor the broker's knowledge of the agent's insolvency, were notice to pledgee of defects in the pledgor's title; and that the owners of the bonds, having by their act enabled their agent to transfer them by delivery, were estopped from asserting their title to the detriment of a *bona fide* holder.

Held, also, (affirming the opinion of the trial judge), that a *bona fide* holder acquiring commercial paper after dishonour takes subject not merely to the equities of prior parties to the paper but also to those of all parties having an interest therein. *In re European Bank. Ex parte The Oriental Commercial Bank* (5 Ch. App. 358), followed.

Young et al. v. *MacNider* .. .. xxv., 272

2.—Title to Land—Sale—Right of Redemption—Effect as to Third Parties—Pledge—Delivery and Possession of Thing Sold.

Real estate was conveyed to S. as security for money advanced by him to the vendor, the deed of sale containing a provision that the vendor should have the right to a re-conveyance on paying to S. the amount of the purchase money, with interest and expenses disbursed, within a certain time. S. subsequently advanced the vendor a further sum and extended the time for redemption. The right of redemption was not exercised by the vendor within the time limited, and S. took possession of the property, which was subsequently seized under an execution issued by V., a judgment creditor of the vendor. S. then filed an opposition claiming the property under the deed.

Held, reversing the judgment of the Court of Queen's Bench, that as it was shown that the parties were acting in good faith, and that they intended the contract to be, as it purported to be, *une vente à réméré*, it was valid as such, not only between themselves but also as respected third persons.

Salvas v. *Vassal* .. .. xxvii., 68

3.—Construction of Contract — Agreement to Secure Advances—Sale—Delivery — Possession — Bailment to Manufacturer.

See Contract, 39.

POLICE REGULATIONS.

Master and Servant — Negligence — "Quebec Factories Act"—R. S. Q. Arts. 3019 to 3053—Art. 1053 C. C.—Civil Responsibility—Accident, Cause of—Conjecture — Evidence — Onus of Proof—Statutable Duty, Breach of —Police Regulations.

See Master and Servant, 7.

POLICY.

1.—Of Insurance Against Fire—Condition in — Particular Account of Loss—Finding of Jury—Evidence.

See Insurance, Fire, 1

2.—Of Insurance Against Fire—Condition Against Assigning—Breach—Chattel Mortgage.

See Insurance, Fire, 2.

3. — Marine Insurance — Misrepresentation—Intent to Deceive — Materiality.

See Insurance, Marine, 1.

4. — Life Insurance — Condition — Note Given for Premium—Non-payment—Demand for Payment After Maturity Waiver.

See Insurance, Life, 2.

5.—Of Insurance Against Fire—Change of Title—Chattel Mortgage.

See Insurance, Fire, 3.

POSSESSION.

1.—Action on Disturbance—Possessory Action—"Possession Annale" — Arts. 946 and 948 C. C. P.—Nature of Possession of Unenclosed Vacant Lands — Boundary Marks — Delivery of Possession.

In 1890, G. purchased a lot of land 25 feet wide, and the vendor pointed it out to him, on the ground, and showed him the pickets marking its width and depth. The lot remained vacant and unenclosed up to the time of the disturbance, and was assessed as a 25 foot lot to G., who paid all municipal taxes and rates thereon. In 1895 the adjoining lot, which was also vacant and unenclosed, was sold to another person, who commenced laying foundations for a building, and in doing so, encroached by two feet on the width of the lot so purchased by G., who brought a possessory action within a couple of months from the date of the disturbance.

Held, that the *possession annale*, required by article 946 of the Code of Civil Procedure, was sufficiently established to entitle the plaintiff to maintain his action.

Gauthier v. *Masson* .. .. .. xxvii., 575

2. — Deed — Construction of — Ambiguous Description—Title to Lands—Conduct of Parties—Presumptions in Favour of Occupant.

See Evidence, 22.

3. — Testamentary Succession — Balance Due by Tutor—Executors—Account, Action for—Action for Provisional Possession—Parties to Action.

See Executions, 2.

4.—Title to Lands — Boundaries — Old Survey—Statute of Limitations.

See Title to Land, 1.

POSSESSION, PROVISIONAL.

See Envoie en Possession.

POWER OF ATTORNEY.

Assignment in Trust for Creditors—Power of Attorney to Assignor—Authority to Use Principal's Name—Sale of Goods—Credit.

See Debtor and Creditor, 2.

POWERS.

Stock Subscriptions — Surrender — Forfeiture — Duty of Directors — Construction of Statute—Cancellation of Shares — Contributories — Irregular Organization — Ultra Vires — "The Companies Act"—"The Winding-up Act"—Pleading.

See Company, 8.

PRACTICE.

1.—Controverted Elections Act—R. S. C. c. 9, s. 30—Judicial Discretion.

R. S. C. c. 9, s. 30, provides that two or more petitions presented relating to the same election or return shall be bracketed together and tried as one petition, but shall stand in the list where the last presented would have stood if it had been the only one, "unless the court otherwise orders."

Held, that the words "unless the court otherwise orders," makes it a matter of judicial discretion to try the petitions separately or together.

Vaudreuil Election Case .. .. .. xxii., 1

2.—Appeal—Trial by Jury—Withdrawal from Jury—Reference to Court—Consent of Parties—Railway Co.—Negligence.

On the trial of an action against a railway company for injuries alleged to have been caused by negligence of the servants of the company in not giving proper notice of the approach of a train at a crossing, whereby plaintiff was struck by the engine and hurt, the case was withdrawn from the jury by consent of counsel for both parties and referred to the full court with power to draw inferences of fact and on the law and facts either to assess damages to the plaintiff or enter a judgment of non-suit. On appeal from the decision of the full court assessing damages to plaintiff:

Held, Gwynne and Patterson, JJ., dissenting, that as by the practice in the Supreme Court of New Brunswick all matters of fact must be decided by the jury, and can only be entertained by the court by consent of parties, the full court in considering the case pursuant to the agreement at the trial acted as a quasi-arbitrator, and its decision was not open to review on appeal as it would have been if the judgment had been given in the regular course of judicial procedure in the court.

Canadian Pacific Railway Co. v. *Fleming*, xxii., 33

3.—Renewal of Writ — Setting Aside Order for—Master Setting Aside His Own Order.

A writ issued from the High Court of Justice for Ontario in June, 1887, was renewed by order of a Master in Chambers three times, the last order being made in May, 1890. In May, 1891, it was served on defendants, who thereupon applied to the Master to have the service and last renewal set aside, which application was granted and the order setting aside said service and renewal was affirmed on appeal by a Judge in Chambers and by the Divisional Court. Special leave to appeal from the decision of the Divisional Court was granted by the Court of Appeal, which also affirmed the order of the Master, Mr. Justice Osler, who delivered the principal judgment, holding that the Master had jurisdiction to review his own order; that plaintiffs had not shown good reasons, under Rule 238 (*a*), for extending the time for service; and the ruling of the Master having been approved by a Judge in Chambers and a Divisional Court, the Court of Appeal could not say that all the tribunals below were wrong in so holding. On appeal to the Supreme Court of Canada.

Held, that for the reasons given by Mr. Justice Osler in the Court of Appeal the appeal to this court must fail and be dismissed with costs.

Howland v. *Dominion Bank* .. .. xxii., 130

4.—Trial—Disagreement of Jury—Question Reserved by Judge—Motion for Judgment—Amendment of Pleadings—New Trial—Judicature Act, Rule 799—Jurisdiction—Final Judgment.

In an action brought to recover damages for the loss of certain glass delivered to defendants for carriage the Judge left to the jury the question of negligence only, reserving any other questions to be decided subsequently by himself. On the question submitted the jury disagreed. Defendant then moved in the Divisional Court for judgment, but pending such motion the plaintiffs applied for and obtained an order of the court amending the statement of claim, and charging other grounds of negligence. The defendants submitted to such order and pleaded to such amendments, and new and material issues were thereby raised for determination. The action as so amended was entered for trial but was not tried before the Divisional Court pronounced judgment on the motion, dismissing plaintiff's action. On appeal to the Court of Appeal from this judgment of the Divisional Court it was reversed and a new trial ordered. On appeal to the Supreme Court:

Held, affirming the judgment of the Court of Appeal, that the action having been disposed of before the issues involved in the case, whether under the original or amended pleadings, had ever been passed upon or considered by the trial Judge or the jury, a new trial should be ordered, and that this was not a case for invoking the power of the court, under Rule 799, to finally put an end to the action.

Held, also, that the judgment of the Court of Appeal ordering a new trial in this case was not a final judgment nor did it come within any of the provisions of the Supreme Court Act authorizing an appeal from judgments not final.

The Canadian Pacific Ry. Co. v. *Cobban Mfg. Co.* .. .. xxii., 132

5.—Venditioni Exponas—Order of Court or Judge—Vacating of Sheriff's Sale—Arts. 553, 662 and 714 C. C. P.—Jurisdiction.

A petition *en nullité de décret* has the same effect as an opposition to a seizure and under Arts. 662 and 663 C. C. P., the Sheriff cannot proceed to the sale of property under a writ of *venditioni exponas* unless said writ is issued by an order of the Court or a Judge. *Bissonette* v. *Laurent* (15 Rev. Leg. 44) approved. Taschereau and Gwynne, JJ., dissenting.

On the question of want of jurisdiction raised by respondent it was held that a judgment in an action to vacate the Sheriff's sale of an immovable is appealable to the Supreme Court under section 29 (*b*), of the Supreme and Exchequer Courts Act.

Dufresne v. *Dixon* (16 Can. S. C. R. 506) followed.

Lefeuntun v. *Véronneau* .. .. xxii., 203

5*a*.—In their declaration the plaintiffs alleged that the defendant had been in possession of certain property since 9th May, 1876, and after the *enquête* they moved the court to amend the declaration by substituting for the "9th May, 1876," the words "1st Dec., 1886." The motion was refused by the Superior Court, which held that the admission amounted to a judicial avowal from which they could not recede, and this decision was affirmed by the Court of Queen's Bench.

On appeal to the Supreme Court, it was *Held*, reversing the judgment of the court below, Fournier, J., dissenting, that the motion should have been allowed by the Superior Court, so as to make the allegation of possession conform with the facts as disclosed by the evidence. Art. 1245 C. C.

Baker v. *La Société de Construction Métropolitaine* .. .. xxii., 364

6.—Practice—Parties to Action—Trespass to Mortgaged Property—First and Subsequent Mortgages—Owner of Equity of Redemption—Transfer of Interest before Action.

Under the Nova Scotia Judicature Act the owner of the equity of redemption can maintain an action for trespass to mortgaged property and injury to the freehold though after the trespass and before action brought he has parted with his equity.—Gwynne, J., dissenting.

Mortgagees out of possession cannot, after their interest has ceased to exist, maintain an action for such trespass and injury committed while they held the title.

Per Gwynne, J.—A mortgagee in possession at the time the trespass and injury is committed is the only person damnified thereby and can maintain an action therefor after he has parted with his interest, nor is he estopped therefrom by having consented to a sale to one of the trespassers of the personal property as to which the trespass was committed. The tort feasors could not set up such estoppel even though the amount recovered from them with the sum received by such mortgagee for his interest should exceed his mortgage debt

Brookfield v. *Brown* .. .. .. xxii., 398

7. — Conveyance — Illegal or Immoral Consideration—Foreclosure — Order for Possession—Pleading—Parties.

Under the Judicature Act of Ontario an action for foreclosure is not to be regarded as including a right to recover possession of the mortgaged premises as in ejectment, and the rule that in such action the plaintiff may obtain an order for delivery of possession does not apply to a case in which the mortgage sought to be foreclosed is held void and plaintiff claims possession as original owner and vendor.

Under said Judicature Act, as formerly, the plea to an action on a contract that it was entered into for an immoral or illegal consideration must set out the particular facts relied upon as establishing such consideration.

Quære: Can the purchaser of the equity of redemption set up such defence as against a mortgagee seeking to foreclose, or is the defence confined to the immediate parties to the contract?

Clark v. *Hagar* .. .. xxii., 510

8.—Information of Intrusion—Subsequent Action—Res Judicata—Beneficial Interest in Land.

In proceedings on an information of intrusion exhibited by the Attorney-General of Canada against the appellant, it had been adjudged that the appellant, who claimed title under a grant from the Crown under the Great Seal of British Columbia, should deliver up possession of certain lands situate within the railway belt in that province. *The Queen* v. *Farwell* (14 Can. S. C. R. 392).

The appellant having registered his grant and taken steps to procure an indefeasible title from the Registrar of Titles of British Columbia, thus preventing grantees of the Crown from obtaining a registered title, another information was exhibited by the Attorney-General to direct the appellant to execute to the Crown in right of Canada a surrender or conveyance of the said lands.

Held, that the proceedings on the information of intrusion did not preclude the Crown from the further remedy claimed.

Farwell v. *The Queen* .. .. .. xxii., 553

8.—Suit in Equity—Alternative Relief—Amendment — Variance from Relief Claimed by Bill.

At the hearing of a suit by P. to enforce performance of an agreement by the devisee of land under a will to convey it to P. he claimed to be entitled to a decree, in the event of the case made by his bill failing, on the ground that the said will was not registered according to the registry laws of New Brunswick, and was therefore void as against him an intending purchaser, and C. had an interest in the land he had agreed to sell to him as an heir-at-law of the estate.

Held, that on a bill claiming title under the will, P. could not have relief based on the proposition that the same will was void against him, and no amendment could be permitted to make a case not only at variance with, but antogonistic to, that set out in the bill, especially as such amendment was not asked for until the hearing.

Porter v. *Hale* .. .. xxiii., 265

9.—Executors and Trustees—Accounts—Jurisdiction of Probate Court—Res Judicata.

A Court of Probate has no jurisdiction the passing of accounts containing items over accounts of trustees under a will, and relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other court, and a Court of Equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the Probate Court.

Grant v. *Maclaren* .. .. xxiii., 310

10.—Public Street—Encroachment on—Building "upon" or "close to" the Line—Charter of Halifax, ss. 454, 455—Petition to Remove Obstruction—Judgment on—Variance.

By sec. 454 of the Charter of the City of Halifax any person intending to erect a building upon or close to the line of the street must first cause such line to be located by the City Engineer and obtain a certificate of the location; and if a building is erected upon or close to the line without such certificate having been obtained the Supreme Court, or a Judge thereof, may, on petition of the Recorder, cause it to be removed. A petition was presented to a Judge, under this section, asking for the removal of a porch built by R. to his house on one of the streets of the city which, the petition alleged, was upon the line of the street. A porch had been erected on the same site in 1855 and removed in 1884; while it stood the portion of the street outside of it, and since its removal the portion up to the house, had been used as a public sidewalk; on the hearing of the petition the original line of the street could not be proved, but the Judge held that it was close to the line so used by the public and ordered its removal. The Supreme Court of Nova Scotia reversed his decision. On appeal to the Supreme Court of Canada:

Held, that the evidence would have justified the Judge in holding that the porch was upon the line but having held that it was close to the line while the petition only called for its removal as upon it, his order was properly reversed.

City of Halifax v. *Reeves* .. .. xxiii., 340

11.—Game Laws—Arts. 1405-1409 R. S. Q.—Seizure of Furs Killed out of Season—Justice of the Peace—Jurisdiction—Prohibition, Writ of.

Under art. 1405 read in connection with art. 1409 R. S. Q., a game keeper is authorized to seize furs on view on board a schooner, without a search warrant, and to have them brought before a Jusitce of the Peace for examination.

A writ of prohibition will not lie against a magistrate acting under secs. 1405-1409 R. S. Q. in examination of the furs so seized where he clearly has jurisdiction, and the only complaint is irregularity in the seizure.

Company of Adventurers of England v. *Joannette* .. .. xxiii., 415

12.—Municipal Corporation — Drainage—Action for Damages — Reference—Drainage Trials Act, 54 Vic. c. 51—Powers of Referee.

Upon reference of an action to a referee under The Drainage Trials Act of Ontario (54 Vic. c. 51), whether under s. 11, or s. 19, the referee has full power to deal with the case as he thinks fit, and to make of his own motion, all necessary amendments to enable him to decide according to the very right and justice of the case, and may convert the claim for damages under said s. 11 into a claim for damages arising under sec. 591 of the Municipal Act.

One whose lands in the adjoining municipality have been damaged cannot, after the by-law has been appealed against and confirmed, and the lands assessed for benefit, contend before the referee to whom his action for such injury has been referred under the Drainage Trials Act, that he was not liable to such assessment, the matter having been concluded by the confirmation of the by-law.

The referee has no jurisdiction to adjudicate as to the propriety of the route selected by the engineer and adopted by by-law, the only remedy, if any, being by appeal against the project proposed by the by-law.

A tenant of land may recover damages suffered during his occupation from construction of drainage work, his rights resting

upon the same foundation as those of a freeholder.

Township of Ellice v. *Hiles.*

Township of Ellice v. *Crooks* .. xxiii., 429

13.—Defense en Fait—Status of Plaintiff—Special Denial—Art. 144 C. C. P.

The quality assumed by the plaintiff in the writ and declaration is considered admitted unless it be specially denied by the defendant.

A *défense en fait* is not a special denial within the meaning of art. 144 C. C. P.

Martindale v. *Powers*.. .. .. xxiii., 597

14.—Set-off—Judgment Against Stranger to Cause—Prete-nom.

A defendant cannot set up by way of compensation to a claim due to plaintiff a judgment (purchased subsequent to the date of the action), against one who is not a party to the cause, and for whom the plaintiff is alleged to be a prête-nom.

Bury v. *Murray* .. .. xxiv., 77

15.—Amendment — Summoning Party in Different Capacity—New Writ.

Where parties are before the court *quâ* executors and the same parties should also be summoned *quá* trustees an amendment to that effect is sufficient and a new writ of summons is not necessary.

Ferrier v. *Trépannier* .. .. .. xxiv., 86

16.—Practice—Equity Suit—New Trial—Construction of Statute as to—Persona Designata—53 Vic. c. 4, s. 85 (N. B.).

53 Vic. c. 4, s. 85 (N. B.), relating to proceedings in equity, provides that in an equity suit "either party may apply for a new trial to the Judge before whom the trial was held."

Held, reversing the decision of the Supreme Court of New Brunswick, Taschereau, J., dissenting, that such application need not be made before the individual before whom the trial was had but could be made to a Judge exercising the same jurisdiction. Therefore, where the Judge in equity who had tried a case resigned his office an application for a new trial could be made to his successor. *Footner* v. *Figes*, (2 Sim. 319), followed.

Bradshaw v. *Baptist Foreign Mission Board*, xxiv., 351

17.—Reference — Report of Referee—Time for Moving Against—Notice of Appeal—Cons. Rules 848, 849—Extension of Time—Confirmation of Report by Lapse of Time.

In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to sec. 101 of the Judicature Act and rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed, and that V. was entitled to $600 damages. The municipality appealed to the Divisional Court from the report, and the court held that the appeal was too late, no notice having been given within the time required by Cons. Rule 848, and refused to extend the time for appealing. A motion for judgment on the report was also made by V. to the court on which it was claimed on behalf of the municipality that the whole case should be gone into upon the evidence, which the court refused to do.

Held, affirming the decision of the Court of Appeal, that the appeal not having been brought within one month from the date of the report, as required by Cons. Rule 848, it was too late; that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which this court would not interfere.

Held, also, Gwynne, J., dissenting, that the report having been confirmed by lapse of time and not appealed against, the court on the motion for judgment was not at liberty to go into the whole case upon the evidence, but was bound to adopt the referee's findings and to give the judgment which those findings called for. *Freeborn* v. *Vandusen* (15 Ont. P. R. 264), approved of and followed.

Township of Colchester South v. *Valad*, xxiv., 622

18.—Administration Proceedings — Jurisdiction of Referee—General Directions.

A referee before whom administration proceedings are taken has no authority to make an order depriving a solicitor of his lien for costs on a fund in court on the ground that adverse parties had a prior claim on such fund for costs which said solicitor's client had been personally ordered to pay,

the administration order not having so directed the referee and there being no general order permiting such interference with the solicitor's *primâ facie* right to the fund.

Bell v. *Wright* .. .. xxiv., 656

19.—Husband and Wife—Purchase of Land by Wife—Re-sale—Garnishee of Purchase Money on—Debt of Husband — Statute of Elizabeth — Hindering or Delaying Creditors.

D. having entered into an agreement to purchase land had the conveyance made to his wife who paid the purchase money and obtained a certificate of ownership from the registrar of deeds, D. having transferred to her all his interest by deed. She sold the land to M. and executed a transfer acknowledging payment of the purchase money, which transfer in some way came into the possession of M.'s solicitors, who had it registered and a new certificate of title issued in favour of M., though the purchase money was not, in fact, paid. M.'s solicitors were also solicitors of certain judgment creditors of D., and judgment having been obtained on their debts the purchase money of said transfer was garnished in the hands of M. and an issue was directed as between the judgment creditors and the wife of D. to determine the title to the money under the garnishee order, and the money was, by consent, paid into court. The judgment creditors claimed the money on the ground that the transfer of the land to D.'s wife was voluntary and void under the Statute of Elizabeth, and that she therefore held the land and was entitled to the purchase money on the resale as trustee for D.

Held, reversing the decision of the Supreme Court of the North-West Territories, that under the evidence given in the case, the original transfer to the wife of D. was *bonâ fide*; that she paid for the land with her own money and bought it for her own use; and that if it was not *bonâ fide* the Supreme Court of the Territories, though exercising the functions and possessing the powers formerly exercised and possessed by courts of equity, could not, in these statutory proceedings, grant the relief that could have been obtained in a suit in equity.

Held, further, also reversing the judgment appealed from, that even if the proceedings were not *bonâ fide* the garnishee proceedings were not properly taken; that the purchase money was to have been paid by M. on delivery of deed of transfer, and the vendor never undertook to treat him as a debtor; that if there was a debt it was not one which D., the judgment debtor as against whom the garnishee proceedings were taken, could maintain an action on in his own right and for his own exclusive benefit; that D.'s wife was not precluded, by having assented to the issue and to the money being paid into court, from claiming that it could not be attached in these proceedings; and that the only relief possible was by an independent suit.

Donohoe v. *Hull* .. .. xxiv., 683

20.—Appeal for Costs—Action in Warranty—Proceedings by Warrantee Before Judgment on Principal Demand.

It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdiction arises and he suffers no prejudice thereby. But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned he does so at his own risk, and if an unfounded action has been taken against the warrantee and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences.

Archibald v. *deLisle*.
Baker v. *deLisle*.
Mowat v. *deLisle* .. .. xxv., 1

21.—Case in Appeal—Additions made to Judgments after Institution of Appeal.

Per Taschereau, J.—Where a court had pronounced judgment in a cause before it, and after proceedings in appeal had been instituted certain of the Judges filed documents with the Prothonotary purporting to be additions to their respective opinions in the case, such documents were improperly allowed to form part of the case on appeal and could not be considered by the appellate court.

Mayhew & Stone .. .. xxvi., 58

22.—Devolution of Estates Act, 49 Vic. (O.) c. 22—Added Parties—Orders 46 & 48, Ontario Judicature Act—R. S. O. (1887) c. 109, s. 30.

A testator divided his real estate among his three sons, the portion of A. C., the eldest, being charged with the payment of

$1,000 to each of his brothers, and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum of fifty dollars per annum out of the estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." A. C. died after the testator, leaving a widow, but no issue.

Held, that the mortgagee of the reversionary interest of one of his brothers in the lands devised to A. C. was improperly added, in the Master's Office, as a party to an administration action, and could take objection at any time to the proceeding either by way of appeal from the report or on further directions, and was not limited to the time mentioned in Order 48 of the Supreme Court of Judicature, which refers only to a motion to discharge or vary the decree.

Cowan et al. v. *Allen et al.* .. .. xxvi., 292

23.—Replevin — Equitable Title — Principal and Agent—Advances to Agent to Buy Goods—Trust Goods Mixed with Those of Agent.

Under the present system of procedure in Ontario an equitable title to chattels will support an action of replevin.

Carter v. *Long & Bisby* .. .. xxvi., 430

24.—Appeal—Collocation and Distribution—Art. 761 C. C. P.—Hypothecary Claims—Assignment — Notice— Registration—Prete-nom—Arts. 20 and 144 C. C. P.—Action to Annul Deed—Parties in Interest — Incidental Proceedings.

The appeal from judgments of distribution under article 761 of the Code of Civil Procedure is not restricted to the parties to the suit, but extends to every person having an interest in the distribution of the moneys levied under the execution.

The provision of article 144 of the Code of Civil Procedure that every fact of which the existence or truth is not expressly denied or declared to be unknown by the pleadings filed shall be held to be admitted, applies to incidental proceedings upon an appeal in the Court of Queen's Bench.

The nullity of a deed of assignment can only be invoked by proceedings to which all persons interested in the deed have been made parties.

Guertin v. *Gosselin* .. .. .. xxvii., 514

25.—Action — Service of—Judgment by Default—Opposition to Judgment — Reasons of — "Rescissoire" Joined with "Rescindant"—Arts. 16, 89 *et seq.*, 483, 489, C. C. P.—False Return of Service.

No entry of default for non-appearance can be made, nor *ex parte* judgment rendered, against a defendant who has not been duly served with the writ of summons, although the papers in the action may have actually reached him through a person with whom they were left by the bailiff.

The provisions of articles 483 and following of the Code of Civil Procedure of Lower Canada relate only to cases where a defendant is legally in default to appear or to plead and have no application to an *ex parte* judgment rendered for default of appearance, in an action which has not been duly served upon the defendant, and the defendant may at any time seek relief against any such judgment and have it set aside, notwithstanding that more than a year and a day may have elapsed from the rendering of the same, and without alleging or establishing that he has a good defence to the action on the merits.

An opposition asking to have a judgment set aside, on the ground that the defendant has not been duly served with the action, which also alleges the defendant's grounds of defence upon the merits, should not be dismissed merely for the reason that the *rescissoire* has thus been improperly joined with the *rescindant*.

Turcotte v. *Danscreau* .. .. .. xxvii., 583

26.—Costs—Repayment of—Reversal of Supreme Court Judgment—Practice.

A judgment of the Supreme Court of Canada allowing an appeal with costs (20 Can. S. C. R. 481), was carried, in further appeal, by the respondents to Her Majesty's Privy Council, where the decision was reversed ((1893) A. C. 506; 63 L. J. 14). The respondents had, however, in the meantime paid the costs under the order of the Supreme Court.

On motion in the Supreme Court of Canada, on behalf of the said respondents, it was held that they were entitled to an order directing the re-payment to them of the costs so paid, the amount of such costs to be settled upon an inquiry before the Registrar of the Supreme Court of Canada.

(Motion granted with costs).

Duggan v. *The London and Canadian Loan and Agency Co. et al.*, 23rd March, 1893.

27.—Appeal—Special Case—Judgment Appealed from—R. S. C. c. 135, s. 44—Practice.

The Supreme Court of Canada will not hear an appeal when the judgment appealed from does not appear in the case filed.

Note.—Before the hearing, attention was drawn to the fact that the formal judgment or order of the court below was not in the printed "Case." Upon counsel undertaking to have it taken out, printed and added to the "Case," the court consented to hear the appeal, but the Chief Justice intimated that, in future, no appeal would be heard if the "Case" did not contain the formal judgment of the court below.

The Town of St. Stephen v. *The County of Charlotte*, 8th November, 1894.

28.—Appeal—Dismissal for Want of Appearance — Application to Reinstate.

On motion to reinstate an appeal which had been dismissed because no counsel had appeared for appellant when the case was called, the only ground stated for asking the indulgence of the court was that counsel had been present not long before the case was called and had felt satisfied that it would not be reached that day, but that the cases before it had been unexpectedly disposed of.

The court declined to reinstate the appeal and refused the motion with costs.

Foran v. *Handley*, 13th March, 1895, xxiv., 706

29. — Appeal — Resignation of Judge — Disqualification—Re-hearing —Practice.

Where one of the Judges who sat during the hearing of an appeal in which judgment had been reserved, resigned his commission before the judgment was rendered, and thereby became disqualified from adjudicating upon the appeal, the practice of the Supreme Court of Canada is to order that the case should be re-heard at the next following session of the court.

Wright v. *The Queen*, 15th March, 1895.

30.—Will—Action to Annul—Capacity to Make—Evidence of Capacity—Onus—Parties—Mis en Causes.

An action for annulment of a will, the execution of which was procured when, as alleged, the testator was not capable of making it, was dismissed because all necessary parties had not been summoned. The Court of Queen's Bench, (Q. R. 3 Q. B. 552), reversed this decision, held that the execution of the will had been procured by undue influence, and annulled it.

The Supreme Court of Canada affirmed the decision of the Court of Queen's Bench, as to parties, holding that the Superior Court should itself have summoned the parties deemed necessary. It also affirmed the judgment as to the will on the ground that the onus was on the party procuring the execution to prove capacity, and that he had not only failed to do so but the evidence was overwhelming against him.

The appeal was dismissed with costs.

Currie v. *Currie*, 6th May, 1895, xxiv., 712

31. — Appeal — Incomplete Record — Remitting Case to Trial Court—Costs.

The respondent had recovered damages for the death of his son, alleged to have been caused by the appellant's fault, and, in the course of the argument of an appeal to the Supreme Court of Canada, the attention of the court was directed to the absence of proof of record as to the relationship between the deceased and the plaintiff, and it was contended on behalf of the appellant that he had no *locus standi*. The hearing was enlarged for a day, and, upon the reassembling of the court, application was made on behalf of the respondent to have the cause remitted to the trial court for the purpose of completing the proofs of relationship and completing the record so as to include the judgments on motions in the courts below to reject the evidence put in on that point.

The court, after hearing counsel for both parties, ordered that the case should be remitted to the trial court for the purpose of receiving evidence as to the relationship of the plaintiff and the identity of the deceased, and no other evidence, but, as a condition precedent to such indulgence, that the plaintiff should pay to the defendants, appellants, the costs incurred by them in the Court of Queen's Bench, appeal side, and in the Superior Court for Lower Canada, such costs to be paid within a time limited and in default, the appeal to stand allowed, and the action to be dismissed with costs to the defendants in all the courts without further order, said costs to be taxed at the diligence of said respondents, the record being retained in the Supreme Court office for the time mentioned, when, if it appeared that the costs had been taxed and paid,

then that the record should be remitted to the trial court for the purposes above mentioned.

Gwynne, J., dissented, and King, J., while concurring as to remitting the record, did not feel disposed to make the plaintiff pay the costs of the Court of Queen's Bench.

Davidson et al. v. *Tremblay*, 10th May, 1895.

32.—NEW TRIAL—CONSENT ORDER—NEGLIGENCE—STREET RAILWAY—ACCIDENT TO WORKMAN ON TRACK—CONTRIBUTORY NEGLIGENCE.

The plaintiff, was injured by a car striking him while at his work on the track. In an action for damages the company defended on the ground that he had not been reasonably careful in looking out for the cars. The trial judge held that plaintiff was the cause of his own misfortune and could not hold defendants liable. This judgment was affirmed by the Divisional Court but reversed by the Court of Appeal for Ontario, which ordered a new trial, and this latter decision was affirmed by the Supreme Court of Canada, Gwynne, J., dissenting.

On counsel for the company stating that a new trial was not desired, judgment was ordered to be entered for plaintiff with $500 damages, the amount assessed by the jury at the trial, and the appeal was dismissed with costs.

The Hamilton Street Railway Co. v. *Moran*, 20th May, 1895 .. .. xxiv., 717

33.—SCHOOL CORPORATION — DECISION OF SUPERINTENDENT OF PUBLIC INSTRUCTION — APPEAL — FINAL JUDGMENT — MANDAMUS—R. S. Q. ARTS. 2055, 2056—55 & 56 VIC. C. 24, SS. 18 AND 19 (QUE.).

Under the provisions of article 2055 of the Revised Statutes of Quebec, as amended by 55 & 56 Vic. c. 24, ss. 18 and 19, certain ratepayers of a school district appealed to the Superintendent of Public Instruction for the Province of Quebec, who thereupon rendered a decision and gave orders and directions respecting the erection of a school house, which, however, the School Commissioners neglected to perform.

Held, affirming the judgment appealed from, that in such cases, the decision of the Superintendent of Public Instruction was final, that no appeal therefrom would lie to the Superior Court, and that the proper remedy to enforce the execution of the orders and directions of the Superintendent was by mandamus.

Les Commissaires d'Ecole de St. Charles v. *Cordeau et al.*, 9th December, 1895.

34. — FINDINGS OF JURY — ANSWERS TO QUESTIONS—NEW TRIAL—NEGLIGENCE—RAILWAY COMPANY—ACT OF INCORPORATION—CHANGE OF NAME.

Where it appeared on the argument before the Supreme Court of Canada, that the jury had not properly answered some of the questions submitted to them at the trial, a new trial was ordered.

Pudsey v. *The Dominion Atlantic Ry. Co.*, 22nd February, 1896 .. .. .. xxv., 691

Note.—In other respects the judgment of the Supreme Court of Nova Scotia (27 N. S. Rep. 498), was affirmed.

35. — TESTAMENTARY SUCCESSION — EXECUTORS—BALANCE DUE BY TUTOR—PRACTICE—ACTION FOR ACCOUNT—PROVISIONAL POSSESSION — ENVOIE EN POSSESSION—PARTIES.

The appeal was from the judgment of the Court of Queen's Bench for Lower Canada (Q. R. 6 Q. B. 34), which reversed the decision of the Superior Court, District of Quebec, and dismissed the plaintiff's action and incidental demand, and held, that on failure of testamentary executors to render an account, the heirs of the testator have no direct action against them for alleged balances in their hands; that their proper recourse would be by an action for account, which should embrace the whole of the administration of the succession by the executors and could not be restricted to particular or isolated matters; that a demand for provisional possession (*envoie en possession*), of a testamentary succession against an executor who has had the administration thereof should implead all the heirs as plaintiffs, that failure in the joinder of any one of them would be fatal and the defendant could not be compelled to call them in as parties to the action, and further, that, in a case where there were several executors, such actions must be brought against them jointly and could not be validly instituted against one of them even with the extra judicial consent of the others.

The Supreme Court of Canada affirmed the decision of the Court of Queen's Bench, and dismissed the appeal with costs.

Cream et al. v. *Davidson*, 1st May, 1897, xxvii., 262

36.—Delay in Proceedings—Motion to Dismiss for Want of Prosecution—Interlocutory Application—Jurisdiction of Judge in Chambers—S. C. Rules 26, 39, 53.

In a case which had not been inscribed on the roll for hearing, a motion was made on behalf of the respondent, before the full court, to dismiss the appeal for want of prosecution, under the 53rd rule of practice of the Supreme Court of Canada.

The court refused to hear the motion, as it was an interlocutory proceeding within the jurisdiction of a Judge in Chambers, and directed that the motion should be made in Chambers.

Fournier v. *Barsalou*, 3rd May, 1898.

37.—Habeas Corpus—Change in Relation of Parties Pending Appeal.

Upon the calling for hearing of the appeal (which was from a judgment of the Supreme Court of British Columbia, refusing a writ of Habeas Corpus, for the possession of Quai Sing, a chinese female, under age), counsel for the respondent produced to the court an order of the Supreme Court of British Columbia, dated subsequently to the judgment appealed from, by which it appeared that the respondent, the matron of a rescue home, had been appointed by that court as guardian to the infant in question, whereupon

The Chief Justice intimated that, under the circumstances it was useless to proceed with the hearing of the appeal, it being impossible that any order could be made thereon respecting the possession of the infant being given to the appellant.

The appeal was consequently dismissed with costs.

Seid Sing Kaw v. *Bowes*, 17th May, 1898.

38.—Appeal—Dismissal for Want of Appearance — Application to Reinstate—Notice—Practice—Costs.

The appeal had been regularly inscribed on the roll for hearing at the May sittings of the Supreme Court of Canada, and on 18th May, 1898, the case being called in the order in which it appeared upon the roll, no person appeared on behalf of the appellant. Counsel appeared for the respondent and asked that the appeal should be dismissed for want of prosecution. The court referred to the fact that the case had been called in its proper place on the roll on the previous day and allowed to stand over because counsel were not present on the part of the appellant, and the appeal was dismissed with costs.

On 20th May, 1898, application by motion was made on behalf of the appellant to have the appeal reinstated and restored to its place on the roll for hearing on such terms as the court might deem appropriate, the ground stated for requesting such indulgence being that counsel for the appellant were under a misapprehension as to the time when the hearing was to take place. The motion was opposed by counsel for the respondent, who objected that proper notice of the motion had not been given as required by the rules of practice.

The court refused to hear the motion or to make an order staying the issue of the certificate of the judgment already rendered, dismissing the appeal, but under the circumstances the motion was dismissed without costs.

The Hall Mines (*Limited*) v. *Moore*, 20th May, 1898.

39.—Winding-up Act—Moneys Paid out of Court—Order Made by Inadvertence—Jurisdiction to Compel Repayment—R. S. C. c. 129. ss. 40, 41, 94—Locus Standi of Receiver-General—55 & 56 Vic. c. 28, s. 2—Statute, Construction of

The liquidators of an insolvent bank passed their final accounts and paid a balance, remaining in their hands, into court. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General of Canada, as trustee of the residue, intervened and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act.

Held, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene although the three years from the date of the deposit mentioned in the Winding-up Act had not expired.

Held, also, that even if he was not so entitled to intervene the provincial courts had jurisdiction to compel repayment into court of the moneys improperly paid out.

Hogaboom v. *The Receiver-General of Canada. In re The Central Bank of Canada.* xxviii., 192

40. — Appeal — Jurisdiction — Amount in Controversy—Affidavits Conflicting as to Amount—The Exchequer Court Acts—50 & 51 Vic. c. 16, ss. 51-53 (D.) —54 & 55 Vic. c. 26, s. 8 (D.)—The Patent Act—R. S. C. c. 61, s. 36.

On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants, showing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the court to hear the appeal did not appear until the filing of the appellant's affidavit in answer to the motion.

Dreschel et al. v. *The Auer Incandescent Light Manufacturing Co.* .. .. xxviii., 268

41.—Appeal—Privy Council Cross-appeal —Practice—Costs.

Where the respondent has taken an appeal from the same judgment as is complained of in the appeal to the Supreme Court of Canada, to the Judicial Committee of Her Majesty's Privy Council, the hearing of the appeal to the Supreme Court will be stayed until the Privy Council appeal has been decided, upon the respondent undertaking to proceed with diligence in the appeal so taken by him.

In the case in question the costs were ordered to be costs in the cause.

Eddy v. *Eddy*, 4th October, 1898.

42.—Appeal—Question of Local Practice —Inscription for Proof and Hearing —Peremptory List—Notice—Requete Civile.

Where a grave injustice has been inflicted upon a party to a suit, the Supreme Court of Canada will interfere for the purpose of granting relief although the question involved upon the appeal may be one of mere local practice only. *Lambe* v. *Armstrong* (27 Can. S. C. R. 390), followed.

Under a local practice prevailing in the Superior Court in the District of Montreal, the plaintiff obtained an order from a judge fixing the day peremptorily for the adduction of evidence and hearing on the merits of a case by precedence over other cases previously inscribed on the roll and without notice to the defendants. The defendant did not appear, and judgment by default was entered in favour of the plaintiff.

Held, reversing the judgments of both courts below upon the defendant's *requête civile*, that the order was improperly made for want of notice to the adverse party as required by the rules of practice of the Supreme Court.

The Eastern Townships Bank v. *Swan*, 21st November, 1898 .. .. xxix., 193

43.—Vacating Sheriff's Sale—Petition—Exposure to Eviction—Refund of Price of Adjudication Paid—Arts. 706, 710, 714, 715 C. C. P.

The provisions of article 715 of the Code of Civil Procedure of Lower Canada do not apply to sheriff's sales which have been perfected by payment of the price of adjudication and execution of the deed, nor does that article give a right to have such a sale vacated and the amount paid refunded.

The procedure by petition for vacating sheriff's sales can only be invoked in cases where an action would lie. *The Trust and Loan Co.* v. *Quintal* (2 Dor. Q. B. 190), followed.

The joinder of the curator to an unopened substitution is not necessary in an action upon the obligation in a mortgage which has priority over the instrument creating the substitution, and a sheriff's sale in execution of a judgment upon such an obligation against the *grevé de substitution* has the effect of discharging the lands from the unopened substitution, notwithstanding that the curator has not been made a party to the action or proceedings. *Chef dit Vadeboncœur* v. *The City of Montreal* (29 Can. S. C. R. 9), followed.

Deschamps v. *Bury*, 14th December 1898. xxix., 274

44.—Appeal—Election Petition—Dissolution of Parliament—Abatement of Proceedings—Return of Deposits—Payment out of Court Below.

See Election Law, 1.

45.—Action Confessoire — Intervenant—Joint Condemnation—Procedure—Interference with on Appeal.

See Servitude, 1.

46.—Appeal—Disqualification of Judge—Quorum in Such Case—52 Vic. c. 37, s. 1.

See Quorum.

47.—New Trial—Improper Reception and Rejection of Evidence — Nominal Damages.

See New Trial, 1.

48.—Opposition—Contestation — Removal from Superior Court—Venditioni Exponas—Appeal.

See Appeal, 26.

49.—Appeal—Final Judgment — Petition for Leave to Intervene—Judgment on—Interlocutory Proceeding.

See Appeal, 41.

50.—Money Counts—Notice of Claim—Special Pleas—"Never Indebted."

See Action, 5.

51.—Action of Warranty—Negligence—Obstruction of Street—Assessment of Damages—Questions of Fact.

See Appeal, 44.

52.—Adding Parties—Orders 46 and 48, Ontario Judicature Act.

See Will, 10.

53.—Chattel Mortgage—Mortgagee in Possession—Negligence—Wilful Default — Sale Under Powers — "Slaughter Sale"—Assignment for Benefit of Creditors—Revocation of.

See Sale, 4.

54.—Appeal—Time Limit—Commencement of—Pronouncing or Entry of Judgment—Security — Delay in Filing—Extension of Time—Order of Judge—Vacation—R. S. C. c. 135, ss. 40, 42, 46.

See Appeal, 49, 50.

55.—Preliminary Objections—Service of Election Petition—Bailiff's Return Cross-examination.

See Election Law, 7.

56.—Questions of Practice — Appeal—Duty of Appellate Court.

See Appeal, 56.

57.—Appeal—Jurisdiction—Discretionary Order—Default to Plead—R. S. C. c. 135, ss. 24 (*a*) and 27—R. S. O. c. 44, s. 65—Ontario Judicature Act, Rule 796.

See Appeal, 65.

58.—Jury Trial—Assignment of Facts—Arts. 353, 414 C. C. P.—Art. 427 C. P. Q. — Inconsistent Findings — Misdirection—New Trial—Pleadings.

See New Trial, 2.

59.—Plea of Litigious Rights—Usurper in Possession—Title to Lands—Art. 1582 C. C.—Impeachment of Title by Warrantor.

See Litigious Rights.

60.—Trustee—Misappropriation — Surety—Knowledge by Cestui Que Trust—Estoppel—Parties.

See Trusts, 10.

61.—Marine Insurance—Partial Loss on Cargo—Stranding — Evidence — Jury Trial.

See Evidence, 34.

62.—Title to Land—Entail—Life Estate—Fiduciary Substitution—Privileges and Hypothecs—Mortgage by Institute—Preferred Claim—Prior Incumbrancer — Vis Major — Registry Laws—Sheriff's Sale—Sheriff's Deed—Chose Jugle — Parties—Estoppel—Deed Poll—Improvements on Substituted Property—Grosses Reparations—Art. 2172 C. C.—29 Vic. c. 26 (Can.).

See Mortgage, 12.

63. — Cross-appeal Pending in Privy Council—Stay of Proceedings.

See Appeal, 1, 79.

PREFERENCES.

See Assignment.
" Debtor and Creditor.
" Fraudulent Conveyances.
" Fraudulent Preferences.
" Insolvency.

PREMIUM NOTE.

1. — Accident Insurance — Renewal of Policy—Payment of Premium—Promissory Note—Instructions to Agent—Agent's Authority — Finding of Jury.

See Insurance, Accident, 1.

2.—Non-payment—Forfeiture—Conditions—Collateral Agreement.

See Insurance, Life, 1.

PREROGATIVE.

OF CROWN—PARDONING POWER — REPRESENTATIVE OF CROWN — LEGISLATIVE AUTHORITY TO CONFER.

See Constitutional Law, 5.

PRESCRIPTION.

1.—ACCOUNTS—ACTION—PROMISSORY NOTE—ACKNOWLEDGMENT AND SECURITY BY NOTARIAL DEED—NOVATION—ARTS. 1169 AND 1171 C. C.—ONUS PROBANDI—ART. 1213 C. C.—PRESCRIPTION—ARTS. 2227, 2260 C. C.

A prescription of thirty years is substituted for that of five years only where the admission of the debt from the debtor results from a new title which changes the commercial obligations to a civil one.

In an action of account instituted in 1887, plaintiff claimed *inter alia* the sum of $2,361.10, being the amount due under a deed of obligation and *constitution d'hypothèque*, executed in 1866, and which on its face was given as security for an antecedent unpaid promissory note dated in 1862. The deed stipulated that the amount was payable on the terms and conditions and the manner mentioned in the said promissory note. The defendants pleaded that the deed did not effect a novation of the debt, and that the amount due by the promissory note was prescribed by more than five years. The note was not produced at the trial.

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), that the deed did not effect a novation. Arts. 1169 and 1171 C. C. At most, it operated as an interruption of the prescription and a renunciation to the benefit of the time up to then elapsed, so as to prolong it for five years if the note was then overdue. Art. 2264 C. C. And as the onus was on the plaintiff to produce the note, and he had not shown that less than five years had elapsed since the maturity of the note, the debt was prescribed by five years. (Art. 2260 C. C.)

Paré v. *Paré* .. ..xxiii., 243

2.—COMMENCEMENT OF PRESCRIPTION—CONTINUING DAMAGE—TORTIOUS ACT.

The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act, and could have been foreseen and claimed for at the time.

Kerr et al. v. *The Atlantic and North-West Railway Co.* .. .. xxv., 197

3.—PURCHASE OF LAND—REGISTERED HYPOTHEC—KNOWLEDGE OF—PRESUMPTION OF GOOD FAITH—ART. 2251 C. C.

See Title to Land, 2.

4.—RIGHT OF SUCCESSION—SALE BY COHEIR—RESTRAIT SUCCESSORAL—ART. 710 C. C.

See Retrait Successoral.

5.—INTERRUPTION OF PRESCRIPTION—NECESSARY WAY—IMPLIED GRANT — USER—OBSTRUCTION OF WAY—ACQUIESCENCE—R. S. N. S. (5 SER.) c. 112.

See Limitation of Actions, 1.

PRESUMPTION.

SALE—DONATION IN FORM OF—GIFTS IN CONTEMPLATION OF DEATH — MORTAL ILLNESS OF DONOR—PRESUMPTION OF NULLITY—VALIDATING CIRCUMSTANCES—DATION EN PAIEMENT—ARTS. 762, 989 C. C.

See Nullity, 2.

And *see* Evidence.

PRETE-NOM.

1.—ASSIGNMENT—ACTION TO ANNUL—PARTIES IN INTEREST.

See Nullity, 1.

2. — BUILDING SOCIETIES — PARTICIPATING BORROWERS—SHAREHOLDERS—C. S. L. C. c. 68—42 & 43 VIC. (Q.) c. 32—LIQUIDATION—EXPIRATION OF CLASSES—ASSESSMENTS ON LOANS—NOTICE OF—INTEREST AND BONUS—USURY LAWS—C. S. C. c. 58—ART. 1785 C. C.—ADMINISTRATORS AND TRUSTEES—SALES TO—ART. 1484 C. C.

See Building Society.

PRINCIPAL AND AGENT.

1. — SALE OF GOODS — SALE THROUGH BROKERS—AGENCY—ACQUIESCENCE.

If parties in Canada contract to purchase goods in New York through brokers, first by telegram and letters, and completed by exchange of bought and sold notes signed by the brokers, the latter may be regarded as agents of the purchasers in Canada; but if not, if the purchasers make no objection to

the form of the contract or to want of authority in the brokers, and after the goods arrive refuse to accept them on other grounds, they will be held to have ratified the contract.

Trent Valley Woollen Mfg. Co. v. *Oelrichs*, xxiii., 682

2.—Negligence of Agent—Lending Money for Principal—Financial Brokers—Liability for Loss — Measure of Damages.

Financial brokers who invest money for a client are his agents in the transaction if they profess to be acting for him and in his interest, though their remuneration may come from the borrower.

An agent who invests money for his principal without taking proper precautions as to the sufficiency of the security is guilty of negligence, and if the value of the security proves less than the amount invested he is liable to his principal for the loss occasioned thereby.

The measure of damages in such a case is not the amount loaned with interest, but the difference between that amount and the actual value of the land.

Taschereau and Gwynne, JJ., dissenting.

Lowenburg, Harris & Company v. *Wolley*, xxv., 51

3.—Trustees and Administrators—Fraudulent Conversion—Past Due Bonds, Transfer of—Negotiable Security—Commercial Paper — Debentures Transferable by Delivery—Equities of Previous Holders—Art. 2287 C. C.—Estoppel—Brokers and Factors—Pledge — Implied Notice — Duty of Pledgee to Make Inquiry—Innocent Holder for Value—Arts. 1487, 1490, 2202 C. C.

The Quebec Turnpike Trusts bonds issued under special Acts and Ordinances (Rev. Stats. Que., 1888, Sup. p. 505), are payable to bearer and transferable by delivery. Certain of these bonds belonging to the estate of the late D. D. Young, had been used as exhibits and marked as such in a case of *Young* v. *Rattray*, and having been afterwards lost were advertised in a newspaper in Quebec in the year 1882. About ten years afterwards W., who was the agent and administrator of the estate and had the bonds in his possession as such, pledged them to a broker for advances on his own account, the bonds then being long past due, but payment being provided for under the above cited statutes.

Held, affirming the judgment of the Court of Queen's Bench, Fournier and Taschereau, JJ., dissenting, that neither the advertisement, nor the marks upon the bonds, nor the broker's knowledge of the agent's insolvency, were notice to pledgee of defects in the pledgor's title; and that the owners of the bonds, having by their act enabled their agent to transfer them by delivery, were estopped from asserting their title to the detriment of a *bonâ fide* holder.

Young et al. v. *MacNider* .. .. xxv., 272

4.—Principal and Agent—Master and Servant — Insurance Agent—Duty—Appointment—Acting for Rival Company—Divided Interests—Dismissal.

To act as agent for a rival insurance company is a breach of an insurance agent's agreement "to fulfil conscientiously all the duties assigned to him, and to act constantly for the best interests of (his employer)" and is sufficient justification for his dismissal.

Judgment of the Court of Appeal for Ontario (22 Ont. App. R. 408), affirmed.

Eastmure v. *The Canada Accident Assurance Co.*, 4th March, 1896 .. .. .. xxv., 691

5.—Assignment of Debt—Confidential Relations — Knowledge of Bookkeeper.

A railway contractor being in difficulties, his sureties took an assignment of the contract and assumed financial control of the business which was carried on as usual, the only accounts thereof being kept by the contractor's book-keeper through whom the disbursement of all moneys was made and who appeared from the evidence to have been acting in the most confidential relations with the sureties, at least in so far as concerned the carrying on of that contract.

Held, that under the circumstances, the book-keeper must be regarded as the agent of the sureties in respect of the contract in question, and that consequently they were bound by his knowledge of an assignment and admission of a debt accruing due to a sub-contractor.

Scoullar et al. v. *McColl*, 24th March, 1896.

6.—Agent's Authority— Representation by Agent—Principal Affected by —Advantage to Other Than Principal—Knowledge of Agent — Constructive Notice.

Where an agent does an act outside of the apparent scope of his authority, and makes a representation to the person with whom

he acts to advance the private ends of himself or some one else other than his principal such representation cannot be called that of the principal.

In such a case it is immaterial whether or not the person to whom the representation was made believed the agent had authority to make it.

The local manager of a bank having received a draft to be accepted, induced the drawer to accept by representing that certain goods of his own were held by the bank as security for the drafts.

In an action on the draft against the acceptor:

Held, affirming the decision of the Supreme Court of New Brunswick, that the bank was not be said to adopt what the manager said taking the benefit of the acceptance it could not be said to adopt what the manager said in procuring it which would burden it with responsibility instead of conferring a benefit; and that the knowledge of the manager with which the bank would be affected should be confined to knowledge of what was material to the transaction and the duty of the manager to make known to the bank.

Richards v. *Bank of Nova Scotia*, xxvi., 381

7.—Trust — Principal and Agent—Advances to Agent to Buy Goods—Trust Goods Mixed with Those of Agent—Replevin—Equitable Title.

If an agent is entrusted by his principal with money to buy goods the money will be considered trust funds in his hands and the principal has the same interest in the goods when bought as he had in the funds producing it.

If the goods so bought are mixed with those of the agent the principal has an equitable title to a quantity to be taken from the mass equivalent to the portion of the money advanced which has been used in the purchase as well as to the unexpended balance.

Carter v. *Long & Bisby* .. .. .. xxvi., 430

8.—Fire Insurance—Conditions in Policy Breach — Waiver — Recognition of Existing Risk After Breach—Authority of Agent.

A policy of fire insurance on a factory and machinery contained a condition making it void if the said property were sold or conveyed or the interest of the parties therein changed.

Held, affirming the decision of the Supreme Court of New Brunswick, that by a chattel mortgage given by the assured on said property his interest therein was changed and the policy forfeited under said condition.

Held, further, that an agent with powers limited to receiving and forwarding applications for insurance had no authority to waive a forfeiture caused by such breach.

Torrop v. *The Imperial Fire Insurance Co.*, xxvi., 585

9.—Accident Insurance — Renewal of Policy—Payment of Premium — Promissory Note — Instructions to Agent—Agent's Authority — Finding of Jury.

A policy issued by the Manufacturers' Acc. Ins. Co., in favour of P., contained a provision that it might be renewed from year to year on payment of the annual premium. One condition of the policy was that it was not to take effect unless the premium was paid prior to any accident on account of which a claim should be made and another that a renewal receipt, to be valid, must be printed in office form, signed by the managing director, and countersigned by the agent. P. having been killed in a railway accident payment on the policy was refused on the ground that it had expired and not been renewed. In action by the widow for the insurance it was shown that the local agent of the company had requested P. to renew and had received from him a promissory note for $15 (the premium being $16), which the father of the assured swore the agent agreed to take for the balance of the premium after being paid the remainder in cash. He also swore that the agent gave P. a paper purporting to be a receipt and gave secondary evidence of its contents. The agent's evidence was that while the note was taken for a portion of the premium it was agreed between him and P., that there was to be no insurance until it was paid, and that he gave no renewal receipt and was paid no cash. Some four years before this the said agent and all agents of the company had received instructions from the head office not to take notes for premiums as had been the practice theretofore. The note was never paid but remained in possession of the agent, the company knowing nothing of it. The jury gave no general verdict, but found in answer to questions that a sum was paid in cash and the note given and accepted as payment of the balance of the premium, and that the paper given to P. by the agent, as sworn to by P.'s father, was the ordinary renewal receipt of the company. Upon these findings judgment was entered against the company.

Held, affirming the judgment of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that the fair conclusion from the

evidence was, that as the agent had been employed to complete the contract and had been entrusted with the renewal receipt P. might fairly expect that he was authorized to take a premium note having no knowledge of any limitation of his authority, and the policy not forbidding it; and that notwithstanding there was no general verdict, and the specific question had not been passed upon by the jury, such inference could be drawn by the court according to the practice in Nova Scotia.

Held, further, that there was evidence upon which reasonable men might find as the jury did; that an inference might fairly be drawn from the facts that the transaction amounted to payment of the premium and it was to be assumed that the act was within the scope of the agent's employment; the fact that the agent was disobeying instructions did not prevent the inference though it might be considered in determining whether or not such inference should be drawn; and that a new trial should not be granted to enable the company to corroborate the testimony of the agent that he had no renewal receipt in his possession except one produced at the trial as the company might have supposed that the plaintiff would seek to show that such receipt had been obtained and were not taken by surprise.

The Manufacturers Accident Insurance Company v. *Pudsey* .. .. xxvii., 374

10.—Broker—Stock Exchange Custom—Sale of Shares—Marginal Transfer—Undisclosed Principal—Acceptance—"Settlement"—Obligation of Purchaser—Construction of Contract—"The Bank Act," R. S. C. c. 120, ss. 70-77—Liability of Shareholders—"Stock Jobbing."

The defendant, a broker doing business on the Toronto Stock Exchange, bought from C., another broker, certain bank shares that had been sold and transferred to C. by the plaintiff. At the time of the sale C. was not aware that the defendant was acting for an undisclosed principal and the name of a principal was not disclosed within the time limited for "settlement" of transactions by the custom of the exchange. The transferee's name was left blank in the transfer book in the bank, but it was noted in the margin that the shares were subject to the order of the defendant who, three days after settlement was due according to the custom of the exchange, made a further marginal memorandum that the shares were subject to the order of H. The affairs of the bank were placed in liquidation within a month after these transactions and the plaintiff's name being put upon the list of contributories, he was obliged to pay double liability upon the shares so transferred under the provisions of "The Bank Act," for which he afterwards recovered judgment against C. and then, taking an assignment of C.'s right of indemnity against the defendant, instituted the present action.

Held, that as the defendant had not disclosed the name of any principal within the time limited for settlement by the custom of the Exchange and the shares had been placed at his order and disposition by the seller, he became legal owner thereof, without the necessity of any formal acceptance upon the transfer books and that he was obliged to indemnify the seller against all consequences in respect of the ownership of the shares, and the double liability imposed under the provisions of "The Bank Act."

Boultbee v. *Gzowski*, 13th October, 1898, xxix., 54

11.—Assignment in Trust for Creditors—Power of Attorney by Trustee—Authority of Attorney to Use Principal's Name—Sale of Goods—Credit.

See Debtor and Creditor, 2.

12.—Agent of Creditor—False Representation as to Agency—Obtaining Payment from Debtor—Ratification—Fraud.

See Debtor and Creditor, 3.

13.—Contract of Sale—Contre Lettre—Construction of Contract—Deed—Absolute Sale.

See Contract, 13.

14.—Debtor and Creditor—Composition and Discharge—Acquiescence in—New Arrangement of Terms of Settlement—Waiver of Time Clause—Principal and Agent—Deed of Discharge—Notice of Withdrawal from Agreement—Fraudulent Preferences.

See Composition and Discharge.

15.—Building Society—Liquidation—Administrators and Trustees—Sales to—Prete-nom—Art. 1484 C. C.

See Trusts, 8.

PRINCIPAL AND SURETY.

1. — Suretyship — Continuing Security — Appropriation of Payments—Imputation of Payment—Reference to take Accounts.

J. H. S. was a local agent for an insurance company and collected premiums on policies secured through his agency, remitting moneys thus received to the branch office at Toronto from time to time. On 1st January, 1890, he was behind in his remittances to the amount of $1,250, and afterwards became further in arrears until on the 15th of October, 1890, one W. S. joined him in a note for the $1,250 for immediate discount by the company, and executed a mortgage on his lands as collateral to the note and renewals that might be given, in which it was declared that payment of the note or renewals or any part thereof was to be considered as a payment upon the mortgage. The company charged J. H. S. with the balance then in arrears which included the sum secured by the note and mortgage, and continued the account as before in their ledger, charging J. H. S. with premiums, etc., and the notes which they retired from time to time as they became due, and crediting moneys received from J. H. S. in the ordinary course of their business, the note and its various renewals being also credited in this general account for cash. W. S. died on 5th December, 1891, and afterwards the company accepted notes signed by J. H. S. alone for the full amount of his indebtedness, which had increased in the meantime, making debit and credit entries as previously in the same account. On the 31st July, 1893, J. H. S. owed on this account a balance of $1,926, which included $1,098 accrued since 1st January, 1890, and after he had been credited with general payments there remained due at the time of trial $1,009. The note W. S. signed on 5th October, 1890, was payable four months after date with interest at 7 per cent, and the mortgage was expressed to be payable in four equal instalments of $312.50 each, with interest on unpaid principal.

Held, Taschereau and Girouard, JJ., dissenting, that the giving of the accomodation notes without reference to the amount secured had not the effect of releasing the surety as being an extension of time granted without his consent and to his prejudice; that the renewal of notes secured by the collateral mortgage was *primâ facie* an admission that, at the respective dates of renewal, at least the amounts mentioned therein were still due upon the security of the mortgage; that in the absence of evidence of such intention it could not be assumed that the deferred payments in the mortgage were to be expedited so as to be *eo instanti* extinguished by entries of credit in the general account which included the debt secured by the mortgtage; and that there being some evidence that the moneys credited in the general account represented premiums of insurance which did not belong to the debtor, but were merely collected by him and remitted for policies issued through his agency, the rule in Clayton's case as to the appropriation of the earlier items of credit towards the extinguishment of the earlier items of debit in the general account would not apply and there should have been a reference to the master to take the account.

The Agricultural Insurance Co. v. *Sargeant*, xxvi., 29

2.—Giving Time to Principal—Reservation of Rights Against Surety.

Where a creditor gives his debtor an extension of time for payment a formal agreement is not required to reserve his rights against a surety, but such reservation may be made out from what took place when the extension was given. *Wyke* v. *Rogers* (1 DeG. M. & G. 408), followed.

Per Gwynne, J., dissenting. The evidence in this case was not sufficient to show that the remedies were reserved.

Gorman v. *Dixon* .. .. xxvi., 87

3.—Vendor and Purchaser—Agreement for Sale of Lands—Assignment by Vendee—Principal and Surety—Deviation from Terms of Agreement—Giving Time—Depriving Surety of Rights—Secret Dealings with Principal—Release of Lands—Arrears of Interest — Novation — Discharge of Surety.

An agreement for the purchase and sale of certain specified lots of land in consideration of a price payable partly in cash and partly by deferred instalments on dates specified was subject to payments being made in advance of those dates under proviso that "the company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The vendee assigned all his interest in the agreement to a third party by a written assignment registered in the vendors' office and at the time there were several conversations between the three parties as to the substitution of the assignee as purchaser of the lots in the place of the original vendee. The vendors afterwards accepted from the assignee several payments upon interest and

upon account of the principal remaining due from time to time as lots and parts of lots were sold by him, and without the knowledge of the vendee arranged a schedule apportioning the amounts of payments to be made for releases of lots sold based on their supposed values, and in fact released lots and parts of lots so sold and conveyed them to sub-purchasers upon payments according to this schedule and not in the ratio of the full number of lots to the unpaid balance of the price and without payment of all interest owing at the time sales were made. The vendors charged the assignee with and accepted from him compound interest and also allowed the assignee an extension of time for the payment of certain interest overdue and thus dealt with him in respect to the property in a manner different from the provisions of the agreement in reference to the conveyance of lots to sub-purchasers.

Held, that the dealings between the vendors and the assignee did not effect a novation by the substitution of him as debtor in the place of the original vendee, or release the vendee from liability under the original agreement.

Held, also, that though the course of dealing did not change the relation of the parties to that of principal creditor, debtor and surety, notice to the vendors of the assignment and their knowledge that the vendee held the land as security for the performance of the assignee's obligations towards him, bound the vendors so to deal with the property as not to affect its value injuriously or impede him in having recourse to it as a security.

In a suit taken by the vendors against the vendee to recover interest overdue, equitable considerations would seem to be satisfied by treating the company as having got from the third party on every release of a part of a lot the full amount that they ought to have got from him on a release for an entire lot and as having received on each transfer all arrears of interest.

In the absence of any sure indication in the agreement the ratio of apportionment of payments for the release of lots sold should be established by adopting the simple arithmetical rule of dividing the amount of the deferred instalments stated in the agreement by the total number of lots mentioned therein.

Wilson v. *The Land Security Co.*, xxvi., 149

4. — Principal and Surety — Guarantee Bond — Default of Principal—Non-disclosure by Creditor.

W. was appointed agent of a company in 1891 to sell its goods on commission, and gave a bond with sureties for the faithful discharge of his duties. His appointment was renewed year after year, a new bond with the same sureties being given to the company on each renewal. His agreement with the company only authorized W. to sell for cash, but at the end of each season he was in arrear in his remittances, which he attributed to slow collections and which he settled by giving an indorsed note, retiring the same before the bond for the next year was executed. After the season of 1894 the company discovered that W. had collected moneys of which he had made no return, and brought an action to recover the same from the sureties.

Held, reversing the decision of the Court of Appeal, that each year there was an employment of W. distinct from, and independent of, those of previous years; that the position of the sureties on re-appointment was the same as if other persons had signed the bond of the preceding year; and that the company was under no obligation, on taking a new bond, to inform the sureties that W. had not punctually performed his undertakings in respect of previous employment, nor did the non-disclosure imply a representation to the sureties when they signed a new bond that they had been punctually performed.

Niagara District Fruit Growers' Stock Company v. *Walker et al.* .. .. .. xxvi., 629

5.—Suretyship — Recourse of Sureties Inter se — Ratable Contripution — Action of Warranty—Banking—Discharge of Co-surety—Reserve of Recourse—Trust Funds in Possession of a Surety—Arts. 1156, 1959 C. C.

Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself if the creditor has already been paid by him.

Where a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourse reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties.

Macdonald v. *Whitfield.*

Whitfield v. *The Merchants' Bank of Canada*, xxvii., 94

6.—Action—Suretyship—Promissory Note—Qualified Indorsement.

D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment, and, A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action some of the books were still in the possession of R., and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm.

Held, that the action was not based upon the real contract between the parties and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes.

Held, further, per Sedgewick, J., that neither the payee of a promissory note nor the drawer of a bill of exchange can maintain an action against an indorser where the action is founded upon the instrument itself.

Robertson v. *Davis* .. .. .. xxvii., 571

7.—Indorser of Note—Release of Maker—Reservation of Rights—Satisfaction of Principal Debt—Release of Debtor—Release of Surety.

The plaintiff and the defendants J. and H. were creditors of the other defendant. The debtor borrowed $600 from the plaintiff, giving him a note for that amount, indorsed by J. and H., the indorsers also assigning to the plaintiff, to the extent of $600, a chattel mortgage upon the debtor's property. The debtor, not being able to pay the claim against him, sold out his business to a third party, who was accepted by both creditors as their debtor and an agreement was entered into by the plaintiff and the new debtor by which time was given to the latter to pay his debt, but in the negotiations that took place no mention was made of the $600 note. An action was brought against both the maker and the indorsers of the note, which, on the trial, was dismissed as against the maker, but the trial judge, holding that the plaintiff had reserved his rights as against the indorsers, gave judgment against them. This judgment was affirmed by the Divisional Court (22 O. R. 235), but was reversed by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal for Ontario (20 Ont. App. R. 298), that the indorsers were relieved from liability upon the note by the release of the maker.

Holliday v. *Hogan*, 20th February, 1894.

8.—Trustee—Misappropriation—Surety—Evidence—Knowledge by Cestui que Trust—Estoppel—Parties.

Funds held by F. as trustee for C. were misappropriated by being deposited with the firm of F. F. & Co., of which F. was a member, and after being so kept on deposit for a period of upwards of six years, were lost in consequence of the failure of the firm. In an action against the defendants, who were sureties for F., to compel them to make good the funds so misappropriated and lost, the defence relied upon the knowledge of the misappropriation on the part of C., which knowledge was sought to be shown by the fact that payments of interest were made to C., from time to time, by cheque of the insolvent firm.

The Supreme Court of Nova Scotia, *en banc* held, that the manner in which these payments were made was not evidence of knowledge on the part of C., that she was bound to communicate to the sureties; that at most it showed nothing more than assent by C. to the deposit of the income to which she was entitled with the firm of which her trustee was a member. The court also held, that the trial judge could have disposed of the contention raised on behalf of the defendants without making C. a party to the suit. And it also seemed to the court that knowledge on the part of C. that some part of the trust fund had been placed by the trustee temporarily with F. F. & Co., awaiting investment on good security, would not be held to be knowledge, assent or acquiescence by C. in the misconduct of the trustee which led to the loss of the funds. (30 N. S. Rep. 173, *sub nomine*, *Eastern Trust Co.* v. *Forrest et al.*)

On appeal, the Supreme Court of Canada affirmed the decision of the Supreme Court of Nova Scotia, *en banc*, and dismissed the appeal with costs.

Bayne et al. v. *The Eastern Trusts Co. et al.*, 9th November, 1897 .. .. .. xxviii., 606

9.—Right of Action—Conveyance Subject to Mortgage—Obligation to Indemnify—Assignment of—Principal and Surety—Implied Contract.

See Action, 16.

And *see* Surety.

PRIVILEGES AND HYPOTHECS.

1.—Sale by Sheriff—Folle Enchere—Resale for False Bidding—690 *et seq.* C. C. P.—Questions of Practice—Appeal—Art. 688 C. C. P.—Sheriff's Deed—Registration of—Absolute Nullity—Rectification of Slight Errors in Judgment—Duty of Appellate Court.

See Sale, 7.

2.—Unpaid Vendor—Conditional Sale—Movables Incorporated with the Freehold—Immovables by Destination—Arts. 375 *et seq.* C. C.

See Movables, 1.

3.—Collocation and Distribution—Art. 761 C. C. P.—Hypothecary Claims—Assignment—Notice—Prete-nom—Arts. 20 and 144 C. C. P.—Nullity of Deed—Incidental Proceedings—Appeal—Parties.

See Judgment of Distribution.

And *see* Mortgage.

PRIVY COUNCIL.

1.—Appeal—Privy Council Cross-appeal—Practice—Costs.

Where the respondent has taken an appeal, from the same judgment as is complained of in the appeal to the Supreme Court of Canada, to the Judicial Committee of Her Majesty's Privy Council, the hearing of the appeal to the Supreme Court will be stayed until the Privy Council appeal has been decided, upon the respondent undertaking to proceed with diligence in the appeal so taken by him.

In the case in question the costs were ordered to be costs in the cause.

Eddy v. *Eddy*, 4th October, 1898.

2.—Reversal of Supreme Court Judgment—Reimbursement of Costs Paid under Supreme Court Order.

See Practice, 26.

3.—Cross-appeal Pending in—Stay of Proceedings—Practice.

See Appeal, 1.

PROBABLE CAUSE.

See Malicious prosecution.

PROCEDURE.

See Practice.

PROHIBITION.

1.—Game Laws—Arts. 1405-1409 R. S. Q.—Seizure of Furs Killed out of Season—Justice of the Peace—Jurisdiction.

Under art. 1405 read in connection with art. 1409 R. S. Q., a game keeper is authorized to seize furs on view on board a schooner, without a search warrant, and to have them brought before a Justice of the Peace for examination. A writ of prohibition will not lie against a magistrate acting under secs. 1405-1409 R. S. Q., in examination of the furs so seized where he clearly has jurisdiction and the only complaint is irregularity in the seizure.

Company of Adventurers of England v. *Jeannette* .. .. xxiii., 415

2.—Sale of Liquor—Sale by Retail—53 Vic. c. 56, s. 18 (O.)—54 Vic. c. 46 (O.)—Local Option—Powers of Legislature—Canada Temperance Act.

See Constitutional Law, 7, 8.

PROVINCIAL SUBSIDIES.

Construction of Statute—British North America Act, 1867, ss. 112, 114, 115, 116, 118—36 Vic. c. 30 (D.)—47 Vic. c. 4 (D.)—Half-yearly Payments—Deduction of Interest.

See Constitutional Law, 6, 10, 13, 17, 20.

PROVISIONAL POSSESSION.

See Envoie en Possession.

PROMISSORY NOTE.

1.—Accommodation—Bad Faith of Holder—Conspiracy.

P. indorsed a note for the accommodation of the maker, who did not pay it at maturity, but having been sued with P. he procured the latter's indorsement to another note agreeing to settle the suit with the proceeds if it was discounted. He applied to a bill broker for the discount, who took it to M., a solicitor, between whom and the broker there was an agreement by which they purchased the notes for mutual profit. M. agreed to discount the note. M.'s firm had a judgment against the maker of the note

and an arrangement was made with the broker by which the latter was to delay paying over the money so that proceedings could be taken for garnishment. This was carried out; the broker received the proceeds of the discounted note and while pretending to pay it over was served with the garnishee process and forbidden to pay more than the balance after deduction of the amount of the judgment and costs; and he offered this amount to the maker of the note which was refused. P., the indorser, then brought an action to restrain M. and the broker from dealing with the discounted note, and for its delivery to himself.

Held, affirming the decision of the Court of Appeal, that the broker was aware that the note was indorsed by P. for the purpose of settling the suit on the former note; that the broker and M. were partners in the transaction of discounting the note and the broker's knowledge was M.'s knowledge; that the property in the note never passed to the broker and M. could only take it subject to the conditions under which the broker held it; that the broker not being the holder of the note there was no debt due from him to the maker and the garnishee order had no effect as against P.; and that the note was held by M. in bad faith and P. was entitled to recover it back.

Millar v. *Plummer* .. .. .. xxii., 253

2.—Transfer — Overdue Note — Equities Attaching — Agreement Between Vendor and Payee — Holder for Value without Notice—Evidence.

An agreement between the maker and payee of a promissory note that it shall only be used for a particular purpose, constitutes an equity which, if the note is used in violation of that agreement, attaches to it in the hands of a *bonâ fide* holder for value who takes it after dishonour. Strong, C.J., and Taschereau, J., dissenting.

MacArthur v. *MacDowell* .. .. xxiii., 571

3.—Consideration — Transfer of Patent Right—Bills of Exchange Act, 53 Vic. c. 33, s. 30, s.s. 4 (D.).

C. & F. were partners in the manufacture of certain articles under a patent owned by F. A creditor of F. for a debt due prior to the partnership induced C. to purchase a half interest in the patent for $700, and join with F. in a promissory note for $1,000 in favour of said creditor who also, as an inducement to F. to sell the half interest, gave the latter $200 for his personal use.

In an action against C. on this note:

Held, reversing the decision of the Court of Appeal, Taschereau, J., dissenting, that the note was given by C. in purchase of the interest in the patent and not having the words "given for a patent right" printed across its face it was void under the Bills of Exchange Act, 53 Vic. c. 33, s. 30, s.-s. 4 (D.).

Craig v. *Samuel* .. .. xxiv. 278

4.—Partnership—Judgment Against Firm —Liability of Reputed Partner — Action on Judgment—Agreement with Indorser.

Where promissory notes are signed by a firm as makers, a person who holds himself out to the payees as a member of such firm, though he may not be so in fact, is liable as a maker

In an action upon a promissory note against M. I. & Co., as makers, and J. I. as indorser, judgment was rendered by default against the firm, and a verdict was found in favour of J. I. as it appeared by the evidence that he had indorsed without consideration for the accommodation of the holders, and upon an agreement with them that he should not be held in any manner liable upon the note.

Held, in a subsequent action on the judgment to recover from J. I. as a member of the firm who had made the note, that the verdict in the former suit was conclusive in his favour, the said agreement meaning that he was not to be liable either as maker or indorser.

Isbester v. *Ray, Street & Co.* .. xxvi., 79

5. — Company — Banking — Discount by President — Credit to Company's Account—Payments out to Company's Creditors—Liability of Company upon Note Given Without Authority—Bona Fides.

Where the president of an incorporated company made a promissory note in the company's name without authority, and discounted it with the company's bankers, the proceeds being credited to the company's account and paid out by cheques in the company's name to its creditors, whose claims should have been paid by the president out of funds which he had previously misappropriated, the bankers, who had taken the note in good faith are entitled to charge the amount thereof at maturity against the company's account.

Judgment of the Court of Appeal for Ontario (23 Ont. App. R. 66), affirmed.

The Bridgewater Cheese Factory Company v. *Murphy*, 21st May, 1896 .. . ..xxvi., 443

6. — Action — Suretyship — Qualified Indorsement.

D. indorsed two promissory notes, *pour aval*, at the same time marking them with the words "not negotiable and given as security." The notes were intended as security to the firm of A. & R. for advances to a third person on the publication of certain guide-books which were to be left in the hands of the firm as further security, the proceeds of sales to be applied towards reimbursement of the advances. It was also agreed that payment of the notes was not to be required while the books remained in the possession of the firm. The notes were protested for non-payment, and, A. having died, R. as surviving partner of the firm and vested with all rights in the notes, sued the maker and indorser jointly and severally for the full amount. At the time of the action, some of the books were still in the possession of R. and it appeared that he had not rendered the indorser any statement of the financial situation between the principal debtor and the firm.

Held, that the action was not based upon the real contract between the parties and that the plaintiff was not, under the circumstances, entitled to recover in an action upon the notes.

Held, further, per Sedgewick, J., that neither the payee of a promissory note nor the drawer of a bill of exchange can maintain an action against an indorser, where the action is founded upon the instrument itself.

Robertson v. *Davis* .. .. .. xxvii. 571

7.—Substitution of Debtor on—Discharge of Maker—Reservation of Rights Against Indorser—Surety.

See Surety, 2.

8.—Security for by Deed—Novation—Arts. 1169 and 1171 C. C.—Prescription.

See Prescription, 1.

9.—Joint and Several — Security for Mortgage Debt — Release of Co-maker.

See Mortgage, 3.

10.—Consideration—Accommodation— Evidence—New Trial.

See Evidence, 9.

11.—Consideration—Accommodation— Discharge of Liability.

See Jury, 1.

12.—Made in Firm Name—Liability of Retired Partner.

See Partnership, 3.

And *see* Bills of Exchange.

PUBLIC INSTRUCTION.

School Corporation—Decision of Superintendent of Public Instruction—Appeal—Final Judgment—Mandamus Practice.

See Mandamus, 1.

PUBLIC LANDS.

Constitutional Law—Navigable Waters—Title to Bed of Stream—Crown—Dedication of Public Lands by—Presumption of Dedication—User—Obstruction to Navigation—Public Nuisance—Balance of Convenience.

See Constitutional Law, 15.

And *see* Crown—Crown lands.

PUBLIC WORK.

1. — Crown — Construction of Public Work — Interference with Public Rights—Injury to Private Owner.

The Exchequer Court of Canada refused compensation to the suppliant for injury to his property by the construction of a public work.

The suppliant owned a saw-mill in Cape Breton, and claimed that he was prevented from rafting his lumber to a shipping point, as formerly, by the construction of a bridge across a pond some distance from the mill, in connection with the building of the Cape Breton Railway. The Exchequer Court held (3 Ex. C. R. 251), that the right alleged to be interfered with was a right common to the public, and that an individual affected by the interference was not entitled to compensation.

The Supreme Court dismissed an appeal from this decision with costs.

Archibald v. *The Queen*, 13th March, 1893, xxiii., 147

2.—Interference with Private Property—Injury to Property Caused by Public Work — Damages Peculiar to Property in Question—Compensation—Eminent Domain.

The Exchequer Court of Canada (4 Ex. C. R. 439), awarded the suppliant damages for injurious affection of his wharf at St. John, N. B., caused by the construction of a branch of the Intercolonial Railway

along the water front of Courtenay Bay, holding, at the same time, that in order to entitle the owner of property to compensation for alleged injury caused through the construction of a public work, it should appear that there was an interference with some right incident to his property, such as a right of way by land or water, which differs in kind from that to which Her Majesty's subjects are ordinarily exposed and that it was not enough that the interference should be greater in degree only than that which is suffered in common with the public.

On appeal to the Supreme Court of Canada, the decision of the Exchequer Court was affirmed and the appeal dismissed with costs.

The Queen v. *Robinson*, 6th May, 1895, xxv., 692

3. — Statute, Construction of — Public Works—Railways and Canals—R. S. C. c. 37, s. 23—Contracts Binding on the Crown—Goods Sold and Delivered on Verbal Order of the Crown Officials—Supplies in Excess of Tender—Errors and Omissions in Accounts Rendered—Findings of Fact—Interest—Arts. 1067 & 1077 C. C.—50 & 51 Vic. c. 16, s. 33.

The provisions of the twenty-third section of the "Act respecting the Department of Railways and Canals" (R. S. C. c. 37), which requires all contracts affecting the Department to be signed by the Minister, the deputy of the Minister or some person especially authorized, and countersigned by the secretary, have reference only to contracts in writing made by the department. (Gwynne, J., *contra.*)

Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties, payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing. (Gwynne and King, JJ., *contra.*)

Where a claim against the Crown arises in the Province of Quebec and there is no contract in writing, the thirty-third section of "The Exchequer Court Act" does not apply, and interest may be recovered against the Crown, according to the practice prevailing in that province.

The Queen v. *Henderson et al.* . . xxviii., 425

4.—Contract for—Authority of Government Engineer to Vary Terms—Delay.

See Contract, 10.

5.—Injury to Property by—Obstruction of Canal—Evidence of Use of Canal.

See Expropriation, 2.

6.—Injury to Property on—Liability of Crown for Tort—50 & 51 Vic. c. 16 (D.).

See Constitutional Law, 9.

7.—Contract—Final Certificate of Engineer—Previous Decision—Necessity to Follow.

See Res Judicata, 6.

8.—Contract — Public Work — Progress Estimates—Engineer's Certificate—Revision by Succeeding Engineer—Action for Payment on Monthly Certificate.

See Action, 6.

9. — Progress Estimates — Arbitration — Engineer's Certificate—Approval by Head of Department—Final Estimates — Condition Precedent — Arbitration.

See Contract, 37.

10.—Contract Binding on the Crown—Public Work — Formation of Contract — Order-in-Council — Ratification—Breach.

See Contract, 46.

QUORUM.

Appeal — Disqualification of Judge — Quorum in Such Case—52 Vic. c. 37, s. 1—Practice.

Where a Judge of the Supreme Court of Canada had, before his appointment, sat during the hearing of the cause upon the appeal in the court below, he is disqualified from sitting or taking part in the hearing or adjudication of an appeal from the judgment rendered therein to the Supreme Court of Canada, notwithstanding that he did not give any opinion nor take any part in the adjudication in the court below nor in the trial court.

The opinion of the court was asked by His Lordship, Mr. Justice King, as to his qualification to sit on the appeal to the Supreme Court of Canada, under the above mentioned circumstances. His Lordship Sir Henry Strong, C.J., was of opinion that under the first section of the Act, 52 Vic. c. 37, Mr. Justice King was disqualified. Fournier, Taschereau and Sedgewick, JJ., concurred. His Lordship Mr. Justice King thereupon retired from the Bench and the

hearing of the appeal was proceeded with before the four other Judges, constituting a quorum under the statute cited.

Grant v. *McLaren*, 9th May, 1894.

RAILWAYS.

1.—Title to Land—Tenant for Life—Conveyance to Railway Company by—Railway Acts—C. S. C. c. 66, s. 11, s.-s. 1—24 Vic. c. 17, s. 1.

By C. S. C. c. 66, s. 11 (Railway Act), all corporations and persons whatever, tenants in tail or for life, *grevés de substitution*, guardians, etc., not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent * * * seized, possessed of or interested in any lands, may contract for, sell and convey unto the company (railway company), all or any part thereof; and any contract, etc., so made shall be valid and effectual in law.

Held, affirming the decision of the Court of Appeal, that a tenant for life is authorized by this Act to convey to a railway company in fee, but the company must pay to the remainderman or into court the proportion of the purchase money representing the remainderman's interest.

Midland Railway of Canada v. *Young*, xxii., 190

2.—Assessment and Taxes—Tax on Railway—Nova Scotia Railway Act—Exemption—Mining Co.—Construction of Railway by—R. S. N. S. 5 ser. c. 53.

By R. S. N. S. 5 ser. c. 53, s. 99, s.-s, 30, the road, bed, etc., of all railway companies in the province is exempt from local taxation. By s. 1 the first part of the Act from secs. 5 to 33 inclusive applies to every railway constructed and in operation or thereafter to be constructed under the authority of any Act of the legislature, and by s. 4, part 2, applies to all railways constructed under authority of any special Act, and to all companies incorporated for their construction and working. by s. 5, s.-s. 15, the expression "the company" in the Act means the company or party authorized by the special Act to construct the railway.

Held, reversing the decision of the Supreme Court of Nova Scotia, Gwynne, J., dissenting, that part one of this Act applies to all railways constructed under provincial statutes and is not exclusive of those mentioned in part two; that a company incorporated by an Act of the legislature as a mining company with power "to construct and make such railroads and branch tracks as might be necessary for the transportation of coal from the mines to the place of shipment and all other business necessary and usually performed on railroads," and with other powers connected with the working of mines "and operation of railways," and empowered by another Act (49 Vic. c. 45 [N. S.]) to hold and work the railway "for general traffic and the conveyance of passengers and freight for hire, as well as for all purposes and operations connected with said mines in accordance with and subject to the provisions of part second of c. 53, R. S. N. S. 5 ser., entitled 'of railways,'" is a railway company within the meaning of the Act; and that the reference in 49 Vic. c. 145, s. 1, to part two does not prevent said railway from coming under the operation of the first part of the Act.

International Coal Co. v. *The County of Cape Breton* .. .. xxii., 305

3.—Passenger—Purchase of Ticket by—Production of Ticket to Conductor—Refusal to Produce—Ejectment from Train — Liability of Company — General Railway Act, 51 Vic. c. 29 (D.), s.s. 247 and 248.

By sec. 248 of the General Railway Act (51 Vic. c. 29), any passenger on a railway train who refuses to pay his fare may be put off the train.

Held, reversing the decision of the Court of Appeal, Fournier, J., dissenting, that the contract between the person buying a railway ticket and the company on whose line it is intended to be used implies that such ticket shall be produced and delivered up to the conductor of the train on which such person travels, and if he is put off a train for refusing or being unable so to produce and deliver it up the company is not liable to an action for such ejectment.

Grand Trunk Railway Co. v. *Beaver*, xxii., 498

4.—Carriage of Passengers — Measure of Obligation as to Latent Defects——Arts. 1053, 1673, 1675, C. C.

Held, reversing the judgments of the Superior Court and Court of Queen's Bench for Lower Canada (appeal side), that where the breaking of a rail is shown to be due to the severity of the climate and the suddenly great variations of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selection, testing, laying and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of

such rail. Fournier, J., dissented, and was of opinion that the accident was caused by a latent defect in the rail, and that a railway company is responsible, under the Code, for injuries resulting from such a defect.

Canadian Pacific Ry. Co. v. *Chalifoux*, xxii., 721

5.—51 & 52 Vic. c. 91, ss. 9, 14 (Que.)—Interpretation—Art. 19, R. S. Q.—Railway Subsidy — Discretionary Power of Lieutenant-Governor in Council—Petition of Right—Misappropriation of Subsidy Moneys by Order in Council.

Where money is granted by the legislature and its application is prescribed in such a way as to confer a discretion upon the Crown no trust is imposed enforceable against the Crown by petition of right.

The appellant railway company alleged by petition of right that by virtue of 51 & 52 Vic. c. 91, the Lieutenant-Governor in Council was authorized to grant 4,000 acres of land per mile for 30 miles of the Hereford Railway; that by an Order in Council dated 6th August, 1888, the land subsidy was converted into a money subsidy, the 9th section of said c. 91, 51 & 52 Vic., enacting that "it shall be lawful," etc., to convert; that the company completed the construction of their line of railway, relying upon the said subsidy and Order in Council, and built the railway in accordance with the Act 51 & 52 Vic. c. 91, and the provisions of the Railway Act of Canada, 51 Vic. c. 29, and they claimed to be entitled to the sum of $49,000, balance due on said subsidy. The Crown demurred on the ground that the statute was permissive only, and by exception pleaded *inter alia*, that the money had been paid by Order in Council to the sub-contractors for work necessary for the construction of the road; that the president had by letter agreed to accept an additional subsidy on an extension of their line of railway to settle difficulties and signed a receipt for the balance of $6,500 due on account of the first susidy. The petition of right was dismissed.

Held, that the statute and documents relied on did not create a liability on the part of the Crown to pay the money voted to the appellant company, enforceable by petition of right: Taschereau and Sedgewick, JJ., dissenting; but assuming it did the letter and receipt signed by the president of the company did not discharge the Crown from such obligation to pay the subsidy, and payment by the Crown of the sub-contractors' claim out of the subsidy money, without the consent of the company, was a misappropriation of the subsidy.

Hereford Ry. Co. v. *The Queen* .. xxiv., 1

6.—Agreement with Foreign Co.—Lease of Road for Term of Years—Transfer of Corporate Rights.

The Canada Southern Railway Co., by its charter and amendments thereto, has authority to enter into an agreement with any other railway company with respect to traffic arrangements or the use and working of the railway or any part thereof, and by the Dominion Railway Act of 1879 it is authorized to enter into traffic arrangements and agreements for the management and working of the railway with any other railway company, in Canada or elsewhere, for a period of twenty-one years.

Held, reversing the decision of the Court of Appeal, that authority to enter into an arrangement for the "use and working" or "management and working" of its road conferred upon the company a larger right than that of making a forwarding agreement or of conferring running powers; that the company could lawfully lease a portion of its road to a foreign company and transfer to the latter all its rights and privileges in respect to such portion, and the foreign company in such case would be protected from liability for injury to property occurring without negligence in its use of the road so leased, to the same extent as the Canada Southern Railway Co. is itself protected.

Michigan Central Rd. Co. v. *Wealleans*, xxiv., 309

7.—Carriage of Goods—Carriage over Connecting Lines — Contract for — Authority of Agent.

E., in Br. Col., being about to purchase goods from G. in Ont., signed, on request of the frieght agent of the Northern Pacific Railway Company in British Columbia, a letter to G. asking him to ship goods via Grand Trunk Railway and Chicago & N. W., care Northern Pacific Railway at St. Paul. This letter was forwarded to the freight agent of the Northern Pacific Railway Company at Toronto, who sent it to G., and wrote to him "I enclose you card of advice and if you will kindly fill it up when you make the shipment send it to me. I will trace and hurry them through and advise you of delivery to consignee." G. shipped the goods as suggested in this letter deliverable to his own order in British Columbia.

Held, affirming the decision of the Court of Appeal, that on arrival of the goods at St. Paul, the Northern Pacific Railway Company was bound to accept delivery of them for carriage to British Columbia and to expedite such carriage; that they were in the care of said company from St. Paul to British Columbia; that the freight agent at Toronto had authority so to bind the company; and that the company was liable to G. for the value of the goods which were delivered to E. at British Columbia without an order from G. and not paid for.

Northern Pacific Ry. Co. v. *Grant*, xxiv., 546

8.—Construction of Statute—Railway Act, 1888, s. 246 (3)—Carriage of Goods—Special Contract—Negligence—Limitation of Liability for.

By sec. 246 (3) of the Railway Act, 1888 (51 Vic. c. 29 [D.]), "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants."

Held, affirming the decision of the Court of Appeal, that this provision does not disable a railway company from entering into a special contract for the carriage of goods and limiting its liability as to amount of damages to be recovered for loss or injury to such goods, arising from negligence. *Vogel* v. *Grand Trunk Railway Co.* (11 Can. S. C. R. 612), and *Bate* v. *Canadian Pacific Railway Co.* (15 Ont. App. R. 388), distinguished.

The Grand Trunk Railway Co. received from R. a horse to be carried over its line, and the agent of the company and R. signed a contract for such carriage which contained this provision: "The company shall in no case be responsible for any amount exceeding one hundred dollars for each and any horse," etc.

Held, affirming the decision of the Court of Appeal, that the words "shall in no case be responsible" were sufficiently general to cover all cases of loss however caused, and the horse having been killed by negligence of servants of the company, R. could not recover more than $100, though the value of the horse largely exceeded that amount.

Robertson v. *The Grand Trunk Ry. Co.*, xxiv., 611

9.—Customs Duties—Exemptions from Duty—Street Rails for Use on Railways—Application to Street Railways.

The exemption from duty in 50 & 51 Vic. c. 39, item 173, of "steel rails weighing not less than twenty-five pounds per lineal yard, for use on railway tracks," does not apply to rails to be used for street railways which are subject to duty as "rails for railways and tramways of any form" under item 88. Strong, C.J., and King, J., dissenting.

Toronto Ry. Co. v. *The Queen* .. xxv., 24

10.—Prescription — Commencement—Continuing Damage — Tortious Act — Public Work—Contractor—Liability of Company for Act of.

The prescription of a right of action for injury to property runs from the time the wrongful act was committed, notwithstanding the injury remains as a continuing cause of damage from year to year, when the damage results exclusively from that act and could have been foreseen and claimed for at the time.

A company building a railway is not liable for injury to property caused by the wrongful act of their contractor in borrowing earth for embankments from a place, and in a manner, not authorized by the contract.

Kerr v. *The Atlantic and North-west Railway Company* .. .. xxv., 197

11.—Railway Company—Loan of Cars—Reasonable Care—Breach of Duty—Negligence—Risk Voluntarily Incurred—"Volenti Non fit Injuria."

A lumber company had railway sidings laid in their yard for convenience in shipping lumber, over the line of railway with which the switches connected, and followed the practice of pointing out to the railway company the loaded cars to be removed, the railway thereupon sending their locomotives and crew to the respective sidings in the lumber yard and bringing away the cars to be despatched from their depot as directed by the bills of lading.

Held, that in the absence of any special agreement to such effect, the railway company's servants while so engaged were not the employees of the lumber company, and that the railway company remained liable for the conduct of the persons in charge of the locomotive used in the moving of the cars; and that where the lumber company's employees remained in a car lawfully pursuing their occupation there, the persons in charge of the locomotive owed them the duty of using reasonable skill and care in

moving the car with them in it, so as to avoid all risk of injury to them.

On the trial of an action for damages in consequence of an employee of the lumber company being killed in a loaded car which was being shunted the jury had found that "the deceased voluntarily accepted the risk of shunting" and that the death of the deceased was caused by defendant's negligence in the shunting, in giving the car too strong a push.

Held, that the verdict meant only that deceased had voluntarily incurred the risks attending the shunting of the cars in a careful and skilful manner, and that the maxim "*volenti non fit injuria*" had no application. *Smith* v. *Baker* ([1891] A. C. 325), applied.

The Canada Atlantic Railway Company v. *Hurdman* .. .. xxv., 205

12.—Findings of Jury—Answers to Questions—New Trial—Negligence—Railway Company—Act of Incorporation—Change of Name.

Where it appeared on the argument before the Supreme Court of Canada, that the jury had not properly answered some of the questions submitted to them at the trial, a new trial was ordered.

Note.—In other respects the judgment of the Supreme Court of Nova Scotia (27 N. S. Rep. 498), was affirmed.

Pudsey v. *The Dominion Atlantic Railway Co.*, 22nd February, 1896 .. .. xxv., 691

13.—Railway Ticket—Right to Stop Over.

By the sale of a railway ticket the contract of the railway company is to convey the purchaser in one continuous journey to his destination; it gives him no right to stop at any intermediate station. *Craig* v. *Great Western Ry. Co.* (24 U. C. Q. B. 509); *Briggs* v. *The Grand Trunk Railway Co.* (24 U. C. Q. B. 516); and *Cunningham* v. *The Grand Trunk Railway Co.* (9 L. C. Jur. 57; 11 L. C. Jur. 107), approved and followed.

Coombs v. *The Queen* .. .. .. xxvi., 13

14.—Railway Company—Negligence—Sparks from Engine or "Hot-box"—Damages by Fire—Evidence—Burden of Proof—C. C. Art. 1053—Questions of Fact.

In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held that there was not sufficient proof that the fire occurred through the fault or negligence of the company and it was not shown that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding.

Sénésac v. *Vermont Central Railway Co.*, xxvi., 641

15.—Carriage of Goods—Connecting Lines—Special Contract—Loss by Fire in Warehouse—Negligence.

In an action by S., a merchant at Merlin, Ont., against the Lake Erie and Detroit River Railway Co., the statement of claim alleged that S. had purchased goods from parties in Toronto and elsewhere to be delivered, some to the G. T. R. Co., and the rest to the C. P. R. and other companies, by the said several companies to be, and the same were, transferred to the Lake Erie, etc., Co., for carriage to Merlin. That on receipt by the Lake Erie Co. of the goods it became their duty to carry them safely to Merlin and deliver them to S. There was also an allegation of a contract by the Lake Erie for storage of the goods and delivery to S. when requested, and a lack of proper care whereby the goods were lost. The goods were destroyed by fire while stored in a building owned by the Lake Erie Co. at Merlin.

Held, reversing the decision of the Court of Appeal, that as to the goods delivered to the G. T. R. to be transferred to the Lake Erie as alleged, if the cause of action stated was one arising *ex delicto* it must fail as the evidence showed that the goods were received from the G. T. R. for carriage under the terms of a special contract contained in the bill of lading and shipping note given by the G. T. R. to the consignors, and if it was a cause of action founded on contract it must also fail as the contract under which the goods were received by the G. T. R. provided among other things, that the company would not be liable for the loss of goods by fire, that goods stored should be at sole risk of the owners, and that the provisions should apply to and for the benefit of every carrier.

Held, further, that as to the goods delivered to the companies other than the G. T. R. to be transferred to the Lake Erie, the latter company was liable under the contract for storage; that the goods were in its possession as warehousemen, and the bills of lading contained no clause, as did those of the G. T. R., giving subsequent carriers the benefit of their provisions; and that the two courts below had held that the loss

was caused by the negligence of servants of the Lake Erie, and such finding should not be interfered with.

Held, also, that as to goods carried on a bill of lading issued by the Lake Erie Co., the company was not liable as there was an express provision therein that owners should incur all risk of loss of goods in charge of the company, as warehousemen; and that such condition was a reasonable one as the company only undertakes to warehouse goods of necessity and for convenience of shippers.

The Lake Erie and Detroit River Railway Co. v. *Sales et al.* .. .. xxvi., 663

16.—Construction of Statute—51 Vic. c. 29, s. 262 (D.)—Railway Crossings—Packing Railway Frogs, Wing-rails, Etc.—Negligence.

The proviso of the fourth sub-section of section 262 of "The Railway Act" (51 Vic. c. 29 (D.), does not apply to the fillings referred to in the third sub-section, and confers no power upon the Railway Committee of the Privy Council to dispense with the filling in of the spaces behind and in front of railway frogs or crossings and the fixed rails and switches during the winter months.

Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 183), reversed.

Washington v. *Grand Trunk Railway Company* .. .. xxviii., 184

(Memo.—This judgment was affirmed on appeal to the Privy Council, 24th Feby., 1899).

17.—Appeal—Jurisdiction—54 & 55 Vic. c. 25, s. 2—Prohibition — Expropriation of Lands — Arbitration — Death of Arbitrator Pending Award—51 Vic. c. 29, ss. 156, 157—Lapse of Time for Making Award—Statute, Construction of—Art. 12 C. C.

The provisions of the second section of the statute, 54 & 55 Vic. c. 25, giving the Supreme Court of Canada jurisdiction to hear appeals in matters of prohibition, apply to such appeals from the Province of Quebec as well as to all other parts of Canada.

In relation to the expropriation of lands for railway purposes, sections 156 and 157 of "The Railway Act" (51 Vic. c. 29, D.), provide as follows:—"156. A majority of the arbitrators at the first meeting after their appointment, or the sole arbitrator, shall fix a day on or before which the award shall be made; and, if the same is not made on or before such day, or some other day to which the time for making it has been prolonged, either by consent of the parties or by resolution of the arbitrators, then the sum offered by the company as aforesaid, shall be the compensation to be paid by the company." "157. If the sole arbitrator appointed by the judge, or any other arbitrator appointed by the two arbitrators dies before the award has been made, or is disqualified, or refuses or fails to act within a reasonable time, then in the case of the sole arbitrator, the judge, upon the application of either party, and upon being satisfied by affidavit or otherwise of such death, disqualification, refusal or failure, may appoint another arbitrator in the place of such sole arbitrator; and in the case of any arbitrator appointed by one of the parties, the company and party respectively may each appoint an arbitrator in the place of its or his arbitrator so deceased or not acting; and in the case of the third arbitrator appointed by the two arbitrators, the provisions of section one hundred and fifty-one shall apply; but no recommencement or repetition of the previous proceedings shall be required in any case."

(Section 151 provides for the appointment of a third arbitrator either by the two arbitrators or by a judge.)

Held, that the provisions of the 157th seciton apply to a case where the arbitrator appointed by the proprietor died before the award had been made and four days prior to the date fixed for making the same; that in such a case the proprietor was entitled to be allowed a reasonable time for the appointment of another arbitrator to fill the vacancy thus caused and to have the arbitration proceedings continued although the time so fixed had expired without any award having been made or the time for the making thereof having been prolonged.

Shannon v. *The Montreal Park and Island Railway Company* .. .. xxviii., 374

18.—Eminent Domain—Expropriation of Lands—Arbitration—Evidence—Findings of Fact—Duty of Appellate Court—51 Vic. c. 29 (D.).

On an arbitration in a matter of the expropriation of land under the provisions of "The Railway Act" the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average of the different estimates made on behalf of both parties according to the evidence before them.

Held, reversing the decision of the Court of Queen's Bench, and restoring the judgment of the Superior Court (Taschereau and Girouard, JJ., dissenting), that the award was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded.

Grand Trunk Railway of Canada v. *Coupal*, xxviii., 531

19.—Regular Depot—Traffic Facilities—Railway Crossings — Negligence — Walking on Line of Railway—Trespass — Invitation — License — 51 Vic. c. 29, ss. 240, 256, 273 (D.).

A passenger abroad a railway train, stormbound, at a place called Lucan Crossing, on the Grand Trunk Railway, left the train and attempted to walk through the storm to his home a few miles distant. Whilst proceeding along the line of the railway, in the direction of an adjacent public highway, he was struck by a locomotive engine and killed. There was no depot or agent maintained by the company at Lucan Crossing, but a room in a small building there was used as a waiting room, passenger tickets were sold and fares charged to and from this point, and, for a number of years, travellers had been allowed to make use of the permanent way in order to reach the nearest highways, there being no other passage way provided.

In an action by his administrators for damages:—

Held, Taschereau and King, JJ., dissenting, that notwithstanding the long user of the permanent way in passing to and from the highways by passengers taking and leaving the company's trains, the deceased could not, under the circumstances, be said to have been there by the invitation or license of the company at the time he was killed, and that the action would not lie.

Grand Trunk Railway of Canada v. *Anderson et al.* .. .. xxviii., 541

20.—Negligence—Accident at Crossing—Notice of Approach.

See Appeal, 5.

21.—Train Extending Beyond Platform—Accident to Passenger—Contributory Negligence.

See Negligence, 5.

22.—44 Vic. c. 1, s. 18—Powers of Canadian Pacific Railway Company to Take and Use Foreshore—49 Vic. c. 32 (B. C.)—City of Vancouver—Right to Extend Streets to Deep Water — Crossing of Railway—Jus Publicum — Implied Extinction by Statute—Injunction.

See Municipal Corporation, 7.

" Foreshore.

23.—Injury to Employee—Negligence of Conductor—Authority — Unsatisfactory Findings of Jury—Appeal from.

See Negligence, 6.

24. — Puelic Work — Construction of Trestles—Interference with Private Property — Injury Caused by the Works—Damages Peculiar to the Property in Question—Compensation—Eminent Domain.

See Public Work, 2.

25.—Municipal By-law—Special Assessments—Drainage—Powers of Councils as to Additional Necessary Works—Ultra Vires Resolutions—Executed Contract.

See Municipal Corporation, 24.

26. — Municipal Corporation — By-law — Assessment — Local Improvements — Agreement with Owners of Property — Construction of Subway — Benefit to Lands.

See Municipal Corporation, 28.

27.—Sparks from Engine—Rubbish on Railway Berm—Damage by Fire—Findings of Jury — Evidence—Concurrent Findings of Courts Appealed from.

See Negligence, 37*b*.

RATABLE CONTRIBUTION.

Water Lots—Accretion to Lands—After Acquired Property—Falsa Demonstratio—Discharge of Mortgage.

See Mortgage, 4.

REAL PROPERTY.

Gas Pipes — Fixtures — Assessment — Exemption from Taxes — Title to Portion of Highway.

See Assessment, 7, *bis*.

And *see* Immovable Property.

REAL PROPERTY ACT.

Registration—Execution— Unregistered Transfers—Equitable Rights—Sales under Execution—R. S. C. c. 51; 51 Vic. (D.) c. 20.

See Registry Laws, 3.

RECEIVER.

OF STOLEN PROPERTY—UNLAWFUL APPROPRIATION—SIMULTANEOUS ACTS—APPROPRIATION BY BAILEE OR TRUSTEE.

See Criminal Law, 2.

REDEMPTION (DROIT DE REMERE).

TITLE TO LAND—SALE—RIGHT OF REDEMPTION—EFFECT AS TO THIRD PARTIES—PLEDGE—DELIVERY AND POSSESSION OF THING SOLD.

See Pledge, 2.

REFEREE.

AGREEMENT RESPECTING LANDS—BOUNDARIES—REFEREE'S DECISION—BORNAGE—ARBITRATION—ARTS. 941-945 AND 1341 *et seq.* C. C. P.

See Arbitration, 3.

REGISTRY LAWS.

1. — TRESPASS — DAMAGES — EASEMENT — EQUITABLE INTEREST—MUNICIPAL BY-LAW, REGISTRATION OF—NOTICE—REGISTRY ACT, R. S. O. c. 114.

R. S. O. (1877) c. 114, s. 83, providing that no lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration but applies to all interests.

If the owner of land gives permission to the municipality to construct a drain through it, the municipality, after the work has been done, has an interest in the land to which the registry laws apply whether the agreement conveys the property, creates an easement or is a mere license which has become irrevocable, and if there has been no by-law authorizing the land to be taken such interest is, under the said section, invalid as against a registered deed executed for value without notice. *Ross* v. *Hunter* (7 Can. S. C. R. 289) distinguished.

The City of Toronto v. *Jarvis* .. xxv., 237

2.—MORTGAGE — AGREEMENT TO CHARGE LANDS—STATUTE OF FRAUDS—REGISTRY.

The owner of an equity of redemption in mortgaged lands, called the Christopher farm, signed an agreement which his solicitor wrote on one of his letter forms under the printed words "Dear Sir," his own name being at the bottom on the left side and he made an affidavit, as subscribing witness, to have it registered. In an action arising out of this agreement it was contended that the solicitor was not a subscribing witness, but only the person to whom the letter was addressed.

Held, affirming the judgment of the Court of Appeal, that the solicitor signed the agreement as a witness and the registration was, therefore, regular, but if not, as the document was upon the registry a subsequent purchaser had actual notice by which he was bound notwithstanding the informality in the proof of execution, which did not make the registration a nullity.

Held, par Taschereau, J., that the agreement did not require attestation and if the solicitor was not a witness it should have been indorsed with a certificate by a county court judge as required by R. S. O. (1887) c. 114, s. 45, and it having been registered the court would presume that such certificate had been obtained.

Rooker v. *Hoofstetter* .. .. .. xxvi., 41

3.—REAL PROPERTY ACT—REGISTRATION — EXECUTION — UNREGISTERED TRANSFERS — EQUITABLE RIGHTS — SALES UNDER EXECUTION.

The provisions of sec. 94 of the Territories Real Property Act (R. S. C. c. 51), as amended by 51 Vic. c. 20 (D.), do not displace the rule of law that an execution creditor can only sell the real estate of his debtor subject to the charges, liens and equities to which the same was subject in the hands of the execution debtor and do not give the execution creditor any superiority of title over prior unregistered transferees, but merely protect the lands from intermediate sales and dispositions by the execution debtor.

If the sheriff sells the purchaser by priority of registration of the sheriff's deed would under the Act take priority over previous unregistered transfers.

Jellett v. *Wilkie*. *Jellett* v. *The Scottish Ontario and Manitoba Land Co* *Jellett* v. *Powell*. *Jellett* v. *Erratt* .. .. xxvi., 282

4. — REGISTERED DEED — PRIORITY OVER EARLIER GRANTEE — POSTPONEMENT — NOTICE.

To postpone a deed which has acquired priority over an earlier conveyance by registration, actual notice, sufficient to make the conduct of the subsequent purchaser in taking and registering his conveyance fraudulent, is indispensable.

The New Brunswick Railway Co. v. *Kelly*, xxvi., 341

5.—Mortgage—Mining Machinery—Registration—Fixtures—Interpretation of Terms — Bill of Sale — Personal Chattels—R. S. N. S. (5 ser.) c. 92, ss. 1, 4 and 10 (Bills of Sale)—55 Vic. (N. S.) c. 1, s. 143 (The Mines Act).

The "fixtures" included in the meaning of the expression "Personal Chattels" by the tenth section of the Nova Scotia "Bills of Sale Act," are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious act.

An instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the Nova Scotia "Bills of Sale Act" (R. S. N. S. 5 ser. c. 92), and there is now no distinction, in this respect, between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee.

Warner v. *Don et al.* .. .. .. xxvi., 388

6.—Of Trade-mark—Rectification.

See Trade-Mark.

7.—Of Deed—Benefit of Registry Act—Purchaser—Notice—R. S. N. S. 5th ser. c. 84.

See Lease, 1.

8.—Chattel Mortgage—55 Vic. c. 26 (O.)—Agreement not to Register—Void Mortgage—Possession by Creditor.

See Chattel Mortgage, 4.

9.—Public Highway—Registered Plan—Dedication — User — Construction of Statute — Retrospective Statutes — Estoppel—46 Vic. (O.) c. 18.

See Highway, 1.

10.—Agreement Charging Lands — Statute of Frauds—Registration—Proof of Execution.

See Notice, 1.

11.—Assignment for Benefit of Creditors —R. S. N. S. (5th ser.) c. 92—Chattel Mortgage—Statute of Elizabeth.

See Chattel Mortgage, 5.

12.—Unpaid Vendor—Hypothecary Creditor — Resolutory Condition — Immovables by Destination—Movables Incorporated with Freehold—C. C. Arts. 379, 2017, 2083, 2085, 2089.

See Contract, 30.

13.—Sale by Sheriff—Sheriff's Deed—Registration of—Absolute Nullity.

See Sale, 7.

14.—Title to Land—Entail—Life Estate—Fiduciary Substitution—Privileges and Hypothecs—Mortgage by Institute—Preferred Claim—Prior Incumbrancer — Vis Major — Practice — Sheriff's Sale — Sheriff's Deed — Chose Jugee — Parties — Estoppel — Deed Poll—Improvements on Substituted Property—Grosses Reparations Art. 2172 C. C.—29 Vic. c. 26 (Can.).

See Mortgage, 12.
" Substitution, 2.

REMAINDER.

Statute, Construction of—Estates Tail, Acts Abolishing—R. S. N. S. (1 ser.) c. 112—R. S. N. S. (2 ser.) c. 112—R. S. N. S. (3 ser.) c. 111—23 Vic. c. 2 (N. S.) —Will—Construction of—Executory Devise Over—"Dying without Issue" —"Lawful Heirs"—"Heirs of the Body"—Estate in Remainder Expectant—Statutory Title—R. S. N. S. (2 ser.) c. 114, ss. 23 and 24—Title by Will—Conveyance by Tenant in Tail.

See Will, 17.

REPLEVIN.

1.—Debtor and Creditor—Agreement—Conditional License to Take Possession of Goods—Creditor's Opinion of Debtor's Incapacity, Bona Fides of —Replevin—Conversion.

See Debtor and Creditor, 6.

2. — Canada Temperance Act — Search Warrant—Magistrate's Jurisdiction—Constable — Justification of Ministerial Officer—Goods in Custodia Legis — Estoppel — Res Judicata — Judgment Inter Partes.

See Canada Temperance Act, 2.

3.—Of Confiscated Gambling Instruments, Moneys, Etc.—Criminal Code, s. 575—"The Canada Evidence Act, 1893"—Rules of Evidence—Impeachment of Forfeiture—Constable.

See Criminal Law, 5.

4.—Trust Goods—Advances to Buy Goods—Equitable Title.

See Action, 9.

" Principal and Agent, 7.

And *see* Revendication.

REPRESENTATION.

By Heirs—Partition per Stirpes or per Capita—Usufruct—Accretion Between Heirs.

See Substitution, 1.

REQUETE CIVILE.

1.—Petition in Revocation of Judgment—Concealment of Evidence—Jurisdiction—C. P. Q. Art. 1177—R. S. C. c. 135, s. 67.

Where judgment on a case in appeal has been rendered by the Supreme Court of Canada and certified to the proper officer of the court of original jurisdiction, the Supreme Court has no jurisdiction to entertain a petition (*requête civile*) for revocation of its judgment on the ground that the opposite party succeeded by the fraudulent concealment of evidence.

Durocher v. *Durocher* .. .. .. xxvii., 634

2.—Appeal—Question of Local Practice—Inscription for Proof and Hearing—Peremptory List—Notice.

See Practice, 41.

RESALE FOR FALSE BIDDING.

Sheriff's Deed—Registration of Absolute Nullity—Arts. 688 & 690 *et seq.* C. C. P.

See Sale, 7.

RESILIATION.

Act of—Signification of Transfer—Condition Precedent to Right of Action.

See Signification.

RES JUDICATA.

1.—Sheriff—Trespass—Sale of Goods by Insolvent—Bona Fides—Judgment of Inferior Tribunal—Estoppel—Bar to Action—Fraudulent Preferences—Pleading.

K. was a trader and in insolvent circumstances when he sold the whole of his stock in trade to D. At the time of this sale D. was aware that two of D.'s creditors had recovered judgments against him. The sheriff afterwards seized the goods so sold, under executions issued upon judgments subsequently obtained, and upon an interpleader issue tried in the County Court the jury found that K. had sold the goods with intent to prefer the creditors who held the prior judgments, but that D. had purchased in good faith and without knowing of such intention on the part of the vendor. Judgment was thereupon entered against D. in the County Court and the judgment was affirmed by the Supreme Court of British Columbia, *en banc*.

In an action afterwards brought by D. against the sheriff for trespass in seizing the goods he obtained a verdict which was, however, set aside by the court, *en banc*, a majority of the judges holding that the County Court judgment was a complete bar to the action.

On appeal to the Supreme Court of Canada:—

Held, reversing the judgment of the Supreme Court of British Columbia, that as the evidence showed that the goods had been purchased in good faith by D. for his own benefit, the sale was not void under the statute respecting fraudulent preferences; that the County Court judgment, being a decision of an inferior tribunal of limited jurisdiction, could not operate as a bar in respect of a cause of action in the Supreme Court, beyond the jurisdiction of the County Court, and further, that even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel, by a plea setting up in detail all the facts necessary to constitute the estoppel, and that from the evidence in the case it appeared that no such estoppel could have been established. Taschereau, J., dissented.

Davies v. *McMillan*, 1st May, 1893.

2.—Information of Intrusion—Subsequent Action—Beneficial Interest in Land.

In proceedings on an information of intrusion exhibited by the Attorney-General of Canada against the appellant, it had been adjudged that the appellant, who claimed title under a grant from the Crown under the Great Seal of British Columbia, should deliver up possession of certain lands situate within the railway belt in that province. *The Queen* v. *Farwell* (14 Can. S. C. R. 392). The appellant having registered his grant and taken steps to procure an indefeasible title from the Registrar of Titles of British Columbia, thus preventing grantees of the Crown from obtaining a registered title, another information was exhibited by the Attorney-General to direct the appellant to

execute to the Crown in right of Canada a surrender or conveyance of the said lands.

Held, that the judgment in intrusion was conclusive against the appellant as to the title. *The Queen* v. *Farwell* (14 Can. S. C. R. 392), and *Attorney-General of British Columbia* v. *Attorney-General of Canada* (14 App. Cas. 295), commented on and distinguished.

Farwell v. *The Queen* .. .. .. xxii., 553

3.—Different Causes of Action—Statute of Frauds.

S. brought a suit for performance of an alleged verbal agreement by M. to give him one-eighth of an interest of his, M.'s interest in a gold mine, but failed to recover as the court held the alleged agreement to be within the Statute of Frauds. On the hearing M. denied the agreement as alleged, but admitted that he had agreed to give S. one-eighth of his interest in the proceeds of the mine when sold, and it having been afterwards sold S. brought another action for payment of such share of the proceeds.

Held, reversing the decision of the Supreme Court of Nova Scotia, Fournier and Taschereau, JJ., dissenting, that S. was not estopped by the first judgment against him from bringing another action.

Held, also, that the contract for a share of the proceeds was not one for sale of an interest in land within the Statute of Frauds.

Stuart v. *Mott* .. .. xxiii., 384

4.—Action—Bar to—Foreign Judgment—Estoppel—Judgment Obtained after Action Begun—R. S. N. S. 5 ser., c. 104, s. 12, s.-s. 7; Orders 24 and 70, Rule 2; Order 35, Rule 38.

A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada. Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. *The Delta* (1 P. D. 393), distinguished.

The combined effect of the orders 24 and 70, rule 2, and s. 12, s.-s. 7 of c. 104 R. S. N. S. (5 ser.), will permit this to be done in Nova Scotia.

Law et al. v. *Hansen* .. .. xxv., 69

5.—Title to Land—Action en Bornage—Surveyor's Report—Judgment on—Acquiescence in Judgment—Chose Jugee.

In an action *en bornage* between M. and B. a surveyor was appointed by the Superior Court to settle the line of division between the lands of the respective parties, and his report, indicating the position of the boundary line, was homologated, and the court directed that boundaries should be placed at certain points on said line. M. appealed from that judgment to the Court of Review claiming that the report gave B. more land than he claimed and that the line should follow the direction of a fence between the properties that had existed for over thirty years. The Court of Review gave effect to this contention and ordered the boundaries to be placed according to it, in which judgment both parties acquiesced and another surveyor was appointed to execute it. He reported that he had placed the boundaries as directed by the Court of Review, but that his measurements showed that the line indicated was not in the line of the old fence and his report was rejected by the Superior Court. The Court of Review, however, held that the report of the first surveyor, having been homologated by the court, was final as to the location of the fence and that the judgment had been properly executed. The Court of Queen's Bench reversed this judgment, set aside the last report and ordered the surveyor to place the boundaries in the true line of the old fence.

Held, reversing the decision of the Court of Queen's Bench, that the judgment of the Court of Review in which the parties acquiesced was *chose jugée* between them not only that the division line between the properties must be located on the line of the old fence, but that such line was one starting at the point indicated in the plan and report of the first surveyor. The Court of Review was right, therefore, in holding that the surveyor executing the judgment could do nothing else than start his line at the said point.

Mercier et vir. v. *Barrette* .. .. xxv., 94

6.—Contract—Public Work—Final Certificate of Engineer—Previous Decision—Necessity to Follow.

The Intercolonial Railway Act provides that no contractor for construction of any part of the road should be paid except on the certificate of the engineer, approved by the commissioners, that the work was completed to his satisfaction. Before the suppliant's work in this case was completed the engineer resigned, and another was appointed to investigate and report on the unsettled claims. His report recommended that a certain sum should be paid to the contractors.

Held, per Taschereau, Sedgewick and King, JJ., that as the court in *McGreevy* v.

The Queen (18 Can. S. C. R. 371), had, under precisely the same state of facts, held that the contractor could not recover that decision should be followed, and the judgment of the Exchequer Court dismissing the petition of right affirmed.

Held, per Gwynne, J., that independently of *McGreevy* v. *The Queen* the contractor could not recover for want of the final certificate.

Held, per Strong, C.J., that as in *McGreevy* v. *The Queen*, a majority of the judges were not in accord on any proposition of law on which the decision depended, it was not an authority binding on the court, and on the merits the contractors were entitled to judgment.

Ross et al. v. *The Queen* .. .. .. xxv., 564

7.—Canada Temperance Act — Search Warrant—Magistrate's Jurisdiction—Constable—Justification of Officer—Goods in Custodia Legis—Replevin—Estoppel—Judgment Inter Partes.

A search warrant issued under "The Canada Temperance Act," is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face it will afford justification to the officer executing it in either criminal or civil proexecuting it in either criminal or civil probad in fact and may have been quashed or set aside. Taschereau, J., dissenting.

The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise.

A judgment on certiorari quashing the warrant would not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside, and such judgment was a judgment *inter partes* only. Taschereau, J., dissenting.

Sleeth v. *Hurlbert* .. .. .. xxv., 620

8.—Nova Scotia Probate Act—R. S. N. S. 5 ser., c. 100; 51 Vic. (N. S.) c. 26—Executors and Administrators — License to Sell Lands—Estoppel.

An executrix obtained from the Probate Court a license to sell real estate of a deceased testator for the payment of his debts. Judgment creditors of the devisees moved to set aside the license, but failed on their motion and again in appeal. The lands were sold under the license and the executrix paid part of the price to the judgment creditors, and they received the same knowing the moneys to have been proceeds of the sale of the lands. Afterwards the judgment creditors, still claiming the license to be null, issued execution against the lands, and the purchaser brought an action to have it declared that the judgment was not a charge thereon.

Held, that the judgment upon the motion to set aside the license was conclusive against the judgment creditors and they were precluded thereby from taking collateral proceedings to charge the lands affected, upon grounds invoked or which might have been invoked upon the motion.

Held, further, that the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the license as having been regularly issued, and were estopped from attacking its validity in answer to the action.

Clarke v. *Phinney* .. .. xxv., 633

9. — Debtor and Creditor — Security Realized by Creditor—Appropriation of Proceeds—Res Judicata.

Under the Judicature Act, estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded.

Cooper et al. v. *Molsons Bank* .. xxvi., 611

10.—Municipal Corporation — Highway—Private Way — Widening Streets — Local Improvement—Special Assessment.

Prior to the proceedings which gave rise to the action, the City of Montreal determined to widen Stanley Street between Sherbrooke and St. Catherine Streets, and passed a by-law to provide for the expropriation of sufficient land, back of the original line of the street, to carry out the intended widening. In the assessment roll prepared to meet the cost of this widening, a rate was set upon all property on the street, not only between St. Catherine and Sherbrooke Streets, but northward to the extreme northerly limit of Stanley Street on the confines of Mount Royal Park. W. attacked this assessment roll, claiming that his property, on the upper part of Stanley Street, should not be assessed for the widening in question as the said upper part of Stanley Street was a private way. The Superior Court gave judgment in favour of W.'s contentions, and quashed the assessment roll. Further expropriations to carry out the proposed widening between St. Catherine and Sherbrooke Streets, were then proceeded with, and assessment rolls prepared by which the whole cost of these expropriations was thrown upon the proprietors between St. Catherine and Sherbrooke Streets, no part being rated against W. or other

proprietors on the upper part of Stanley Street. Objections were thereupon filed to set aside these assessment rolls on the ground that the assessments were augmented by improperly releasing the property on the upper part of Stanley Street from any portion of the assessment, and W. was called into the case to defend his interests.

The Superior Court held, 1st. That the former judgment in the action between W. and the City of Montreal was *res judicata* and that the upper portion of Stanley Street was a private way and therefore exempt from assessment; and 2nd. Even if that point had not been settled by the former judgment, that the petitioners had failed to prove that the street was not a private way.

This judgment was affirmed by the Court of Queen's Bench (Q. R. 6 Q. B. 107), and upon further appeal:—

The Supreme Court of Canada affirmed the decision of the Court of Queen's Bench, and dismissed the appeal with costs.

Stevenson et al. v. *The City of Montreal & White, Mis en Cause*, 7th June, 1897, xxvii., 593

11. — PETITORY ACTION — ENCROACHMENT — CONSTRUCTIONS UNDER MISTAKE OF TITLE—GOOD FAITH—COMMON ERROR—BORNAGE—ARTS. 412, 413, 429 *et seq.*, 1047, 1241 C. C.—INDEMNITY—DEMOLITION OF WORKS.

An action to revendicate a strip of land upon which an encroachment was admitted to have taken place by the erection of a building extending beyond the boundary line, and for the demolition and removal of the walls and the eviction of the defendant, involves questions relating to a title to land, independently of the controversy as to bare ownership, and is appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Act.

Where, as the result of a mutual error respecting the division line, a proprietor had in good faith and with the knowledge and consent of the owner of the adjoining lot, erected valuable buildings upon his own property and it afterwards appeared that his walls encroach slightly upon his neighbour's land, he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of reasonable indemnity.

In an action for revendication under the circumstances above mentioned, the judgment previously rendered in an action *en bornage* between the same parties cannot be set up as *res judicata*, against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions were different.

Delorme v. *Cusson* .. .. xxviii., 66

12.—COMPANY — FORFEITURE OF CHARTER — ESTOPPEL—COMPLIANCE WITH STATUTE—ACTION—RES JUDICATA.

In an action against a River Improvement Company for repayment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, etc., for which tolls were claimed were not placed on the properties mentioned in the letters patent for the company; that the company did not comply with the statutory requirements that the works should be completed within two years from the date of incorporation, whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters, contrary to the provisions of the Timber Slide Companies Act, and could not exact tolls in respect of such works. By a consent judgment in a former action between the same parties it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands, whose report was to be accepted in place of that provided for by the Timber Slide Companies Act, and to be acted upon by the Commissioner in fixing the schedule of tolls.

Held, affirming the judgment of the Court of Appeal for Ontario, that the above grounds of impeachment were covered by the consent and were *res judicata*.

Held, further, that plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the Commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited.

Hardy Lumber Co. v. *Pickerel River Improvement Co.*, 14th Dec., 1898 .. .. xxix.

12*a*.—COURT OF PROBATE — JURISDICTION — ACCOUNTS OF EXECUTORS AND TRUSTEES.

See Trusts, 3.

13. — PARTNERSHIP — JUDGMENT AGAINST FIRM—LIABILITY OF REPUTED PARTNER ACTION ON JUDGMENT — AGREEMENT AGAINST LIABILITY.

See Partnership, 6.
" Promissory Note, 4.

14.—Title to Land—Entail—Life Estate—Fiduciary Substitution—Privileges and Hypothecs—Mortgage by Institute—Preferred Claim—Prior Incumbrancer—Vis Major—Registry Laws—Practice—Sheriff's Sale—Chose Jugee—Parties—Estoppel—Deed Poll—Impovements on Substituted Property—Crosses Reparation—Art. 2172 C. C.—29 Vic. c. 26 (Can.).

See Mortgage, 12.
" Substitution, 2.

RETRAIT SUCCESSORAL.

Rights of Succession—Sale by Co-heir—Sale by Curator Before Partition—Art. 710 C. C.—Prescription.

When a co-heir has assigned his share in a succession before partition any other co-heir may claim such share upon reimbursing the purchaser thereof the price of such assignment and such claim is imprescriptible so long as the partition has not taken place.

A sale by a curator of the assets of an insolvent, even though authorized by a Judge, which includes an undivided share of a succession of which there has been no partition does not deprive the other co-heirs of their right to exercise by direct action against the purchaser thereof the *retrait successoral* of such undivided hereditary rights.

The heir exercising the *retrait successoral* is only bound to reimburse the price paid by the original purchaser, and not bound in his action to tender the moneys paid by the purchaser.

Baxter v. *Phillips* .. .. xxiii., 317

REVENDICATION.

Of Moneys Seized in Gambling House—Rules of Evidence—Impeachment of Judgment Declaring Forfeiture.

See Criminal Law, 5.

And *see* Replevin.

REVENUE LAWS.

Revenue—Customs Duties—Imported Goods—Importation into Canada—Tariff Act—Construction—Retrospective Legislation—R. S. C. c. 32—56 & 57 Vic. c. 33 (D.)—58 & 59 Vic. c. 23 (D.)-

See Statute, Construction of, 31.

REVERSION.

1.—Mortgage—Leasehold Premises—Terms of Mortgage—Assignment or Sub-lease.

See Lease, 3.

2.—Mortgage—Leasehold Estate—Assignment of Equity of Redemption—Acquisition of Reversion by Assignee—Priority—Merger.

See Mortgage, 10.
" Merger.

REVIEW, COURT OF.

Appeal from Court of Review—Appeal to Privy Council—Appealable Amount—54 & 55 Vic. (D.) c. 25, s. 3, s.-s. 3 & 4—C. S. L. C. c. 77, s. 25—Arts. 1115, 1178 C. C. P.—R. S. Q. Art. 2311.

See Statute, Construction of, 29.

RIPARIAN PROPRIETORS.

Canadian Waters—Property in Beds—Public Harbours—Erections in Navigable Waters—Interference with Navigation—Right of Fishing—Power to Grant Riparian Proprietors—Great Lakes and Navigable Rivers—Operation of Magna Charta—Provincial Legislation—R. S. O. (1887) c. 24, s. 47—55 Vic. c. 10, ss. 5 to 13, 19 and 21 (O.)—R. S. Q. Arts. 1375 to 1378.

Riparian proprietors before Confederation had an exclusive right of fishing in non-navigable, and in navigable non-tidal, lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown. *Robertson* v. *The Queen* (6 Can. S. C. R. 52), followed.

The rule that riparian proprietors own *ad medium filum aquæ* does not apply to the great lakes or navigable rivers.

Per Gwynne, J.—R. S. O. c. 24, s. 47, is *ultra vires* so far as it assumes to authorize the sale of land covered with water within public harbours. The margins of navigable rivers and lakes may be sold if there is an understanding with the Dominion Government for protection againt interference with navigation.

The Act of 1892 and R. S. Q. arts. 1375 to 1378 are valid if passed in aid of a Dominion Act for protection of fisheries. If not they are *ultra vires*.

In re Jurisdiction over Provincial Fisheries.
xxvi., 444

SALE.

1.—Of Goods — Trover — Conversion of Vessel—Joint Owners—Marine Insurance—Abandonment—Salvage.

A sale by one joint owner of property does not amount, as against his co-owner, to a conversion unless the property is destroyed by such sale or the co-owner is deprived of all beneficial interest.

Rourke v. *Union Ins. Co.* .. .. xxiii., 344

2.—Sale of Goods by Sample—Inspection—Place of Delivery.

Where goods are sold by sample the place of delivery is, in the absence of a special agreement to the contrary, the place for inspection by the buyer, and refusal to inspect there when opportunity therefor is afforded is a breach of the contract to purchase.

Trent Valley Woollen Mfg. Co. v. *Oelrichs*, xxiii., 682

3.—Sale of Goods—Statute of Frauds—Memorandum in Writing — Repudiating Contract by.

A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo. under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale.

Martin v. *Haubner* .. .. .. xxvi., 142

4. — Mortgaged Goods — Sale under Powers—Chattel Mortgage — Mortgagee in Possession — Negligence — Wilful Default—"Slaughter Sale"—Practice—Assignment for Benefit of Creditors—Revocation of.

A mortgagee in possession who sells the mortgaged goods in a reckless and improvident manner is liable to account not only for what he actually receives but for what he might have obtained for the goods had he acted with a proper regard for the interests of the mortgagor.

An assignment for the benefit of creditors is revocable until the creditors either execute or otherwise assent to it.

Under the provisions of R. S. O. c. 122, in order to enable the assignee of a chose in action to sue in his own name, the assignment must be in writing, but a written instrument is not required to restore the assignor to his original right of action.

Where creditors refused to accept the benefit of an assignment under R. S. O. c. 124, and the assignor was notified of such refusal and that the assignment had not been registered, an action for damages was properly brought in the name of the assignor against a mortgagee of his stock in trade who sold the goods in an improper manner.

Rennie v. *Block et al.* .. .. .. xxvi., 356

5.—Contract—Sale of Goods by Sample—Objections to Invoice—Reasonable Time—Acquiescence—Evidence.

If a merchant receives an invoice and retains it for a considerable time without any objection, there is a presumption against him that the price stated in the invoice was that agreed upon.

Judgment of the Court of Queen's Bench, that the evidence was sufficient to rebut the presumption, reversed, Gwynne, J., dissenting, and holding that the appeal depended on mere matters of fact as to which an Appellate Court should not interfere.

Kearney v. *Letellier* .. .. xxvii., 1

6.—Title to Land—Right of Redemption—Effect as to Third Parties—Pledge—Delivery and Possession of Thing Sold.

Real estate was conveyed to S. as security for money advanced by him to the vendor, the deed of sale containing a provision that the vendor should have the right to a re-conveyance on paying to S. the amount of the purchase money, with interest and expenses disbursed, within a certain time. S. subsequently advanced the vendor a further sum and extended the time for redemption. The right of redemption was not exercised by the vendor within the time limited, and S. took possession of the property, which was subsequently seized under an execution issued by V. a judgment creditor of the vendor. S. then filed an opposition claiming the property under the deed.

Held, reversing the judgment of the Court of Queen's Bench, that as it was shown that the parties were acting in good faith, and that they intended the contract to be, as it purported to be, *une vente à réméré*, it was valid as such, not only between themselves but also as respected third persons.

Salvas v. *Vassal* .. .. xxvii., 68

7.—Sale of Lands by Sheriff—Folle Enchere—Resale for False Bidding Arts. 690 *et seq.* C. C. P.—Art. 688 C. C. P.—Privileges and Hypothecs—Sheriff's Deed — Registration of—Absolute Nullity.

Part of lands seized by the sheriff had been withdrawn before sale, but on proceedings for *folle enchère* it was ordered that the

property described in the *procès verbal* of seizure should be resold, no reference being made to the part withdrawn. On appeal the Court of Queen's Bench reversed the order on the ground that it directed a resale of property which had not been sold and further because an apparently regular sheriff's deed of the lands actually sold had been duly registered, and had not been annulled by the order for resale, or prior to the proceedings for *folle enchère*.

Held, that the sheriff's deed having been issued improperly and without authority should be treated as an absolute nullity notwithstanding that it had been registered and appeared upon its face to have been regularly issued, and it was not necessary to have it annulled before taking proceedings for *folle enchère*.

Lambe v. *Armstrong* .. .. .. xxvii., 309

8.—Unpaid Vendor—Conditional Sale of Goods — Suspensive Condition — Movables Incorporated with Freehold—Immovables by Destination — Hypothecary Charges—Arts. 375 *et seq.* C. C.

A suspensive condition in an agreement for the sale of movables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid condition.

La Banque d'Hochelaga v. *The Waterous Engine Works Co.* .. .. xxvii., 406

9.—Title to Lands—Donation in Form of Sale—Gifts in Contemplation of Death—Mortal Illness of Donor—Presumption of Nullity—Validating Circumstances—Dation en Paiement—Arts. 762, 989 C. C.

During her last illness and a short time before her death, B. granted certain lands to V. by an instrument purporting to be a deed of sale for a price therein stated, but in reality the transaction was intended as a settlement of arrears of salary due by B. to the grantee and the considertion acknowledged by the deed was never paid.

Held, reversing the decision of the Court of Queen's Bench, that the deed could not be set aside and annulled as void, under the provisions of article 762 of the Civil Code, as the circumstances tended to show that the transaction was actually for good consideration (*dation en paiement*), and consequently legal and valid.

Valade v. *Lalonde* .. .. xxvii., 551

10.—Construction of Contract—Agreement to Secure Advances—Sale of Goods—Pledge—Delivery of Possession—Arts. 434, 1025, 1026, 1027, 1472, 1474, 1492, 1994 *c.*, C. C.—Bailment to Manufacturer.

K. B. made an agreement with T. for the purchase of the output of his sawmill during the season of 1896, a memorandum being executed between them to the effect that T. sold and K. B. purchased all the lumber that he should saw at his mill during the season, delivered at Hadlow wharf, at Levis; that the purchasers should have the right to refuse all lumber rejected by their culler; that the lumber delivered, culled and piled on the wharf should be paid for at prices stated; that the seller should pay the purchasers $1.50 per hundred deals, Quebec standard, to meet the cost of unloading cars, classification and piling on the wharf; that the seller should manufacture the lumber according to specifications furnished by the purchasers; that the purchasers should make payments in cash once a month for the lumber delivered, less two and a half per cent; that the purchasers should advance money upon the sale of the lumber on condition that the seller should, at the option of the purchasers, furnish collateral security on his property, including the mill and machinery belonging to him, and obtain a promissory note from his wife for the amount of each cullage, the advances being made on the culler's certificates showing receipt of logs not exceeding $25 per hundred logs of fourteen inches standard; that all logs paid for by the purchasers should be their property, and should be stamped with their name, and that all advances should bear interest at a rate of 7 per cent. Before the river drive commenced, the logs were culled and received on behalf of the purchasers, and stamped with their usual mark, and they paid for them a total sum averaging $32.33 per hundred. Some of the logs also bore the seller's mark, and a small quantity, which was buried in snow and ice, were not stamped, but were received on behalf of the purchasers along with the others. The logs were then allowed to remain in the actual possession of the seller. During the season a writ of execution issued against the seller under which all movable property in his possession was seized, including a quantity of the logs in question, lying along the river-drive and at the mill, and also a quantity of lumber into which part of the logs in question had been manufactured, at the seller's mill.

Held (Taschereau, J., taking no part in the judgment upon the merits), that the contract so made between the parties constituted a sale of the logs, and, as a necessary

consequence, of the deals and boards into which part of them had been manufactured.
King et al. v. *Dupuis dit Gilbert*, xxviii., 388

11.—Vendor and Purchaser — Sale of Leased Premises — Termination of Lease—Damages—Art. 1663 C. C.

The Court of Queen's Bench for Lower Canada (Q. R. 7 Q. B. 293), reversed the decision of the trial court and held: That the purchaser of real estate to be delivered forthwith could not require the vendor to eject the tenants, the existence of leases being no impediment to immediate delivery of the premises sold, and every sale being subject to existing leases up to the time of the expiration of the current term, and further, that if the purchaser refused to carry out the agreement for sale on the ground of the existence of such leases, he could not have the sale set aside (*resciliée*), with damages against the vendor.

On appeal the Supreme Court of Canada affirmed the judgment appealed from for the reasons stated in the Court of Queen's Bench and dismissed the appeal with costs.
Alley v. *The Canada Life Assurance Co.*, 14th June, 1898 .. .. xxviii., 608

12.—Sale of Land—Building Restrictions — Construction of Covenant—Description—Street Boundaries.

See Contract, 2.

13.—Sale of Goods—Contract for Deals—Place of Delivery—Warranty As to Quality—Acceptance—Arts. 1073, 1473, 1507 C. C.

See Contract, 3.

14.—Sale of Goods—Person to Whom Credit was Given—Assignment in Trust — Power of Attorney by Trustee—Authority of Attorney to Use Principal's Name—Evidence.

See Debtor and Creditor, 2.

15.—Sale of Land Subject to Mortgage—Indemnity of Vendor—Special Agreement—Purchaser Trustee for Third Party.

See Mortgage, 2.

16.—Contract for Sale of Land—Agreement to Pay Interest—Delay—Default of Vendor.

See Vender and Purchaser, 2.

17.—Sale of Land—Description in Deed—Extent — Terminal Point — Number of Rods.

See Deed, 1.

18.—Title to Land—Sale by Auction—Agreement as to Title—Breach—Rescission of Contract.

See Vendor and Purchaser, 4.

19.—Sale of Timber—Delivery—Time of Payment—Premature Action—Vendor and Purchaser.

See Contract, 19.

20.—Sale of Bonds—Trustees and Administrators—Fraudulent Conversion—Past Due Bonds—Negotiable Security — Commercial Paper — Debentures Transferable by Delivery—Equity of Previous Holders — Estoppel — Brokers and Factors—Pledge—Implied Notice—Innocent Holder for Value—Principal and Agent.

See Pledge, 1.

21. — Ships and Shipping — Notice of Abandonment — Sale of Vessel by Master—Necessity for Sale—Marine Insurance—Constructive Total Loss.

See Insurance, Marine, 5.

22.—Sale of Machinery — Resolutory Condition — Immovables by Destination—Movables Incorporated with the Freehold — Severance from Realty—Hypothecary Creditor—Unpaid Vendor.

See Contract, 30.

23.—Sale of Land—Error—Rescission of Contract.

See Vendor and Purchaser, 11*a*.

SAVINGS BANK.

Loan by—Pledge of Securities—Validity of Pledge—R. S. C. c. 122, s. 20.

See Debtor and Creditor, 5.

SCHOOLS.

By-law—High School District—Townships Detached.

The appellant moved to quash a by-law of the County of Elgin, passed to detach certain townships from the high school districts to which they had been attached up to that time. The grounds upon which the by-law was attacked were that it was *ultra vires* of the county council; that the districts could only be changed by consent of the municipalities interested; and that it did not provide for the continued liability of the municipalities detached for debts previously incurred. The motion to quash was made before Mr. Justice Robertson, who dismissed it with costs, and his decision was affirmed by the Court of Appeal for Ontario (21 Ont. App. R. 583).

The Supreme Court of Canada, affirmed the judgment of the court below, and dismissed the appeal with costs.

Wilson v. *The County of Elgin*, 18th March, 1895 .. .. xxiv., 706

2.—School Corporation — Decision of Superintendent of Public Instruction — Appeal — Final Judgment — Mandamus—Practice.

See Mandamus, 1.

SCHOOL FUND AND LANDS.

See Constitutional Law.

SEAL FISHING.

Imperial Act, 56 & 57 Vic. 23 ss. 1, 3 and 4—Order in Council under—Judicial Notice—Russian Cruiser—War Vessel—Presence within Prohibited Zone—Burden of Proof.

See Evidence, 5.

SEARCH WARRANT.

1. — Canada Temperance Act — Magistrate's Jurisdiction—Constable—Justification of Officer—Goods in Custodia Legis — Replevin — Estoppel — Res Judicata.

A search warrant issued under "The Canada Temperance Act" is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside. Taschereau, J., dissenting.

The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise.

A judgment on certiorari quashing the warrant would not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside, and such judgment was a judgment *inter partes* only. Taschereau, J., dissenting.

Sleeth v. *Hurlbert* .. .. .. xxv., 629

2.—Seizure of Furs Without Warrant—Game Laws—Jurisdiction of Magistrate—R. S. Q. Arts. 1405-1409—Writ of Prohibition.

See Prohibition, 1.

SECURITY.

1.—For Debt — Debtor and Creditor — Security for Debt—Security Realized by Creditor—Appropriation of Proceeds—Res Judicata.

See Banking, 4.

2.—Security for Appeal—Time Limit—Commencement of—Delay in Filing—Extension of Time—Order of Judge—Vacation—R. S. C. c. 135, ss. 40, 42, 46.

See Appeal, 49.

3.—Security for Appeal—Time Limit—Commencement of—Pronouncing or Entry of Judgment — Security — Extension of Time—Order of Judge—R. S. C. c. 135, ss. 40, 42, 46.

See Appeal, 50.

SEIGNORIAL TENURE.

Title to Lands—Deed of Concession—Construction of Deed — Words of Limitation—Covenant by Grantee—Charges Running with the Title—Servitude—Condition, si Voluero—Prescriptive Title—Edits et Ordonnances (L. C.)—Municipal Regulations—23 Vic. (C.) c. 85.

See Servitude, 2.

SEIZIN.

Possessory Action — Vacant Lands — Boundary Marks—Delivery of Possession.

See Evidence, 29.

SEPARATE ESTATE.

Constitutional Law—Marital Rights—Married Woman—Separate Estate—Jurisdiction of North-west Territorial Legislature — Statute—Interpretation of—40 Vic. c. 7, s. 3 and Amendments—R. S. C. c. 50—N. W. Ter. Ord. No. 16 of 1889.

See Married Woman, 2.

SERVICE OF PROCESS.

1.—Service of Election Petition—Certified Copy—Bailiff's Return—Cross-examination—Production of Copy.

See Election Law, 7.

2.—False Return of Service of Summons—Judgment by Default—Opposition to Judgment—Arts. 16, 89 *et seq.*, 483, 489 C. C. P.

See Action, 15.
And *See* Signification.

SERVITUDE.

1.—Action—Real or Apparent Servitude—Registration—44 & 45 Vic. c. 16, ss. 5 and 6 (Que.)—Art. 1508 C. C.—Procedure Matters in Appeal.

By deed of sale dated 2nd April, 1860, the vendor of cadastral Lot No. 360 in the Parish of Ste. Marguerite de Blairfindie, district of Iberville, reserved for himself, as owner of Lot 370, a carriage road to be kept open and in order by the vendee. The respondent Ferdais as assignee of the owner of Lot 370 continued to enjoy the use of the said carriage road, which was sufficiently indicated by an open road, until 1887, when he was prevented by appellant Cully from using the said road. C. had purchased the Lot 369 from McD., intervenant, without any mention of any servitude and the original title deed creating the servitude was not registered within the time prescribed by 44 & 45 Vic. (Que.), c. 16, ss. 5 and 6. In an action *confessoire* brought by F. against C. the latter filed a dilatory exception to enable him to call McD. in warranty and McD. having intervened pleaded to the action. C. never pleaded to the merits of the action. The Judge who tried the case dismissed McD.'s intervention and maintained the action. This judgment was affirmed by the Court of Queen's Bench.

On appeal to the Supreme Court of Canada:

Held, affirming the judgment of the court below, that the deed created an apparent servitude, (which need not be registered), and that there was sufficient evidence of an open road having been used by F. and his predecesssors in title as owners of Lot No. 370 to maintain his action *confessoire*.

Held, also that though it would appear by the procedure in the case that McD. and C. had been irregularly condemned jointly to pay the amount of the judgment, yet as McD. had pleaded to the merits of the action and had taken up *fait at cause* for C. with his knowledge, and both courts had held them jointly liable, this court would not interfere in such a matter of practice and procedure.

Macdonald v. *Ferdais* .. .. .. xxii., 260

2.—Title to Lands—Seignorial Tenure—Deed of Concession—Construction of Deed—Words of Limitation—Covenant by Grantee—Charges Running with the Title—Condition, si Voluero—Prescriptive Title—Edits & Ordonnances (L. C.)—Municipal Regulatons—23 Vic. (Can.) c. 85.

In 1768 the Seigneur of Berthier granted an island called "l'île du Milieu," lying adjacent to the "Common of Berthier" to M. his heirs and assigns (*ses hoirs et ayants cause*), in consideration of certain fixed annual payments and subject to the following stipulation:—"en outre à condition qu'il fera à ses frais, *s'il le juge nécessaire*, une clôture bonne et valable, à l'épreuve des animaux de la Commune, sans aucun recours ni garantie à cet égard de la part de sieur seigneur, lesquelles conditions ont été acceptées du dit sieur preneur, pour sureté de quoi il a hypothèqué tous ses biens présents et à venir, et spécialement la dite isle qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre."

Held, reversing the decision of the Court of Queen's Bench, Strong, C.J., dissenting, that the clause quoted did not impose merely a personal obligation on the grantee, but created a real charge or servitude upon l'île du Milieu for the benefit of the "Common of Berthier."

That the servitude consisted in suffering inroads from the cattle of the Common wherever and whenever the grantee did not exclude them from his island by the construction of a good and sufficient fence.

This servitude results not only from the terms of the seignorial grant, but also from the circumstances and the conduct of the parties from a time immemorial.

That the two lots of land although not contiguous were sufficiently close to permit the creation of a servitude by one in favour of the other.

That the stipulation as contained in the original grant of 1768 was not merely facultative.

That the servitude in question is also sufficiently established by the laws in force in Canada at the time of the grant in 1768, respecting fencing and the maintenance of fences in front of habitations or settlements.

La Commune de Berthier v. *Denis*, xxvii., 147

3.—Deed—Construction of—Servitude—Roadway—User—Art. 549 C. C.

In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed to which they all were parties they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves,

their heirs and assigns." Prior to this deed and for some time afterwards the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his *auteurs*, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way.

In an action (*négatoire*) to prohibit further use of way:

Held, affirming the decision of the Court of Queen's Bench, that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchaser was merely to establish servitudes across their respective lands so far as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain.

Riou v. *Riou* .. .. xxviii., 53

4.—Necessary Way—Implied Grant—User—Obstruction of Way—Prescription Limitation of Action—R. S. N. S. (5 ser.) c. 112.

See Limitation of Action, 1.

And *see* Easement.

SHELLEY'S CASE.

Rule in—Devise of Life Estate — Remainder to Issue in Fee.

See Will.

SHERIFF.

1.—Title to Land—Entail—Life Estate—Fiduciary Substitution — Privileges and Hypothecs—Mortgage by Institute—Preferred Claim — Prior Incumbrancer—Vis Major—16 Vic. c. 25 Registry Laws—Practice—Sheriff's Sale—Chose Jugee — Parties—Estoppel — Sheriff's Deed—Deed Poll—Improvements on Substituted Property—Grosses Reparations.

The institute, *grevé de substitution*, in possession of land and curator to the substitution, upon judicial authority, mortgaged the land under the provisions of the Act for the relief of sufferers by the great Montreal Fire of 1852 (16 Vic. c. 25), for a loan which was expended in reconstructing buildings upon the property. On default in payment the mortgagee obtained judgment against the institute, and caused the lands to be sold in execution by the sheriff in a suit to which the curator had not been made a party.

Held, that, as the mortgagee had been judicially authorized and was given special preference by the statute, superior to any rights or interests that might arise under the substitution, the sale by the sheriff in execution of the judgment so recovered discharged the lands from the substitution not yet open, and effectually passed the title to the purchaser for the whole estate, including that of the substitute as well as that of the *grevé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution against the said lands.

The sheriff seized and sold lands under a writ of execution against a defendant described therein, and in the process of seizure and also in the deed to the purchaser at sheriff's sale, as *grevé de substitution*:

Held, that the term used was merely descriptive of the defendant and did not limit the estate seized, sold or conveyed under the execution.

Judgment of the Court of Queen's Bench for Lower Canada affirmed. Taschereau and King, JJ., dissenting.

Chef dit Vadeboncœur v. *The City of Montreal*, 13th October, 1898 .. .. .. xxix., 9

2.—Title to Land — Sheriff—Vacating Sale—Exposure to Eviction—Actio Condictio Indebiti—Petition—Refund of Price Paid—Prior Incumbrance—Substitution not yet Open — Discharge of Incumbrances.

The procedure by petition provided by the Code of Civil Procedure of Lower Canada for vacating sheriff's sales can be invoked only in cases where an action would lie. *The Trust and Loan Co.* v. *Quintal* (2 Dor. Q. B. 190), followed.

The *actio condictio indebiti* for the recovery of the price paid by the purchaser for lands lies only in cases of actual eviction. Mere exposure to eviction is not sufficient ground for vacating a sheriff's sale.

The provisions of article 714 of the Code of Civil Procedure do not apply to sheriff's sales which have been perfected by payment of the price of adjudication and the execution of the deed, nor does that article give a right to have the sale vacated and the amount so paid refunded.

A sheriff's sale in execution of a judgment against the owner of lands, *grevé de substitution*, based upon an obligation in a mortgage having priority over the instrument by which the substitution was created, discharges the lands from the unopened substitution without the necessity of making the curator to the substitution a party to the proceedings. *Chef dit Vadeboncœur* v. *The City of Montreal* (29 Can. S. C. R. 9), followed.

Deschamps v. *Bury*, 14th December, 1898, xxix.

3.—Sale of Goods by Sheriff—Trespass—Sale of Goods by Insolvent—Bona Fides—Judgment of Inferior Tribunal—Estoppel—Res Judicata—Bar to Action—Fraudulent Preferences—Pleading.

See Fraudulent Preferences, 1.

4.—Sale of Land—Writ of Venditioni Exponas—Order of Court or Judge for.

See Practice, 5.

5—Sheriff's Deed—Registration of—Absolute Nullity—Folle Enchere—Resale for False Bidding.

See Appeal, 56.

6.—Deed by—Champerty—Maintenance.

See Evidence, 27.

7.—Title to Land—Prescription—Limitation of Actions—Equivocal Possession—Mala Fides—Sheriff's Deed—Nullity.

See Appeal, 69.

SHIPS AND SHIPPING.

1.—Chartered Ship—Perishable Goods—Ship Disabled by Excepted Perils—Transshipment—Obligation to Transship—Repairs—Reasonable Time—Carrier—Bailee.

If a chartered ship be disabled by excepted perils from completing the voyage the owner does not necessarily lose the benefit of his contract, but may forward the goods by other means to the place of destination and earn the freight.

The option to transship must be exercised within a reasonable time, and if repairs are decided upon they must be effected with reasonable despatch or otherwise the owner of the cargo becomes entitled to his goods.

Quære.—Is the ship-owner obliged to transship?

If the goods are such as would perish before repairs could be made the ship-owner should either transship, deliver them up or sell if the cargo owner does not object, and his duty is the same if a portion of the cargo, severable from the rest, is perishable.

And if in such a case the goods are sold without the consent of the owner the latter is entitled to recover from the ship-owner the amount they would have been worth to him if he had received them at the port of shipment or at their destination at the time of the breach of duty.

Owen v. *Outerbridge* .. .. .. xxvi., 272

2.—Maritime Law—Collision—Rules of the Road—Narrow Channel—Navigation, Rules of—R. S. C. c. 79, s. 2, Arts. 15, 16, 18, 19, 21, 22 and 23—"Crossing" Ships—"Meeting" Ships—"Passing" Ships—Breach of Rules—Presumption of Fault—Contributory Negligence—Moiety of Damages—36 and 37 Vic. (Imp.) c. 85, s. 17—Manœuvres in "Agony of Collision."

If two vessels approach each other in the position of "passing" ships (with a side light of one dead ahead of the other), where unless the course of one or both is changed they will go clear of each other, no statutory rule is imposed, but they are governed by the rules of good navigation.

If one of two "passing" ships acts consistently with good seamanship and the other persists, without good reason, in keeping on the wrong side of the channel; in starboarding the helm when it was seen that the helm of the other was hard to port and the vessels are rapidly approaching; and, after signalling that she was going to port, in turning her bow to starboard, she is to blame for a collision which follows.

The non-observance of the statutory rule (art. 18), that steamships shall slacken speed, or stop, or reverse, if necessary, when approaching another ship, so as to involve a collision, is not to be considered as a fact contributing to a collision, provided the collision could have been avoided by the impinging vessel by reasonable care exerted up to the time of the collision.

Excusable manœuvres executed in "agony of collision" brought about by another vessel, although in contravention of statutory rules, cannot be imputed as contributory negligence on the part of the vessel collided with.

The rule that in narrow channels steamships shall, when safe and practicable, keep

to the starboard (art. 21), does not override the general rule of navigation which would also apply to appropriate cases. *The Leverington* (11 P. D. 117), followed.

The "Cuba" v. McMillan .. .. xxvi., 651

3. — MARITIME LAW — AFFREIGHTMENT — CARRIERS—CHARTERPARTY—PRIVITY OF CONTRACT — NEGLIGENCE — STOWAGE — FRAGILE GOODS—BILL OF LADING—CONDITION—NOTICE—ARTS. 1674, 1675, 1676 C. C.—CONTRACT AGAINST LIABILITY FOR FAULT OF SERVANTS—ARTS. 2383 (8); 2390, 2409; 2413, 2424, 2427 C. C.

The chartering of a ship with its company for a particular voyage by a transportation company does not relieve the owners and master from liability upon contracts of affreightment during such voyage where the exclusive control and navigation of the ship are left with the master, mariners and other servants of the owners and the contract had been made with them only.

The shipper's knowledge of the manner in which his goods are being stowed under a contract of affreightment does not alone excuse ship-owners from liability for damages caused through improper or insufficient stowage.

A condition in a bill of lading, providing that the ship-owners shall not be liable for negligence on the part of the master or mariners, or their other servants or agents is not contrary to public policy nor prohibited by law in the Province of Quebec.

Where a bill of lading provided that glass was carried only on condition that the ship and railway companies were not to be liable for any breakage that might occur, whether from negligence, rough handling or any other cause whatever, and that the owners were to be "exempt from the perils of the seas, and not answerable for damages and losses by collisions, stranding and all other accidents of navigation, even though the damage or loss from these may be attributable to some wrongful act, fault, neglect or error in judgment of the pilot, master, mariners or other servants of the ship-owners; nor for breakage or any other damage arising from the nature of the goods shipped," such provisions applied only to loss or damage resulting from acts done during the carriage of the goods and did not cover damages caused by neglect or improper stowage prior to the commencement of the voyage.

The Glengoil Steamship Company v. *Pilkington.*

The Glengoil Steamship Company v. *Ferguson,* xxviii., 146

4.—COLLISION AT SEA — NEGLIGENCE—DEFECTIVE STEERING GEAR—QUESTION OF FACT—INTERFERENCE WITH DECISION OF LOCAL JUDGE IN ADMIRALTY.

See Appeal, 19.

5. — MARINE INSURANCE — CONSTRUCTIVE TOTAL LOSS—NOTICE OF ABANDONMENT SALE OF VESSEL BY MASTER—NECESSITY FOR SALE.

See Insurance, Marine, 5.

6.—FOREIGN FISHING VESSELS—"FISHING"—CONVENTION OF 1818—THREE MILE LIMIT—59 GEO. III. c. 38 (IMP.)—R. S. C. c. 94 AND c. 95.

See Fisheries, 3.

7.—HIRE OF TUG—CONDITIONS—REPAIRS—NEGLIGENCE—COMPENSATION.

See Lease, 5.

SIGNIFICATION.

OF TRANSFER—CONDITION PRECEDENT TO RIGHT OF ACTION—PARTNERSHIP TRANSACTION IN REAL ESTATE—ACT OF RESILIATION, EFFECT OF.

The signification of a transfer or sale of a debt or right of action is a condition precedent to the right of action of the transferee or purchaser against the debtor, and the necessity of such signification is not removed by proof of knowledge by the debtor of the transfer or sale.

The want of such signification is put in issue by a *défense au fonds en fait.*

M. and B. entered into a speculation together in the purchase of real estate the title to which was taken in the name of B. and the first instalment of purchase money was acquired from a brother of M., to whom B. gave an obligation therefor and transferred to M. a half interest in the property. As each subsequent instalment of purchase money fell due a suit was taken by the vendor against B. and the judgments in such suits as well as the obligation for the first instalment was transferred to M., but without any signification in either case. Subsequently by a formal act of resiliation B. and M. annulled the transfer of the half interest in the property made by B. to M., and formally relieved M. of all further obligation as proprietor *par indivis* for further advances toward the balance due the vendor and threw the burden of providing it entirely upon B.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (appeal

side), that the act of resiliation and the replacement of the title which it effected into the name of B. was a virtual abandonment on the part of M. of all previous investments made by him in the property or in the claims of others against that property of which he may have taken transfers.

Murphy v. *Bury* .. .. xxiv., 668

SLANDER.

LIBEL — PRIVILEGED STATEMENTS — PUBLIC INTEREST — CHARGING CORRUPTION AGAINST POLITICAL CANDIDATE—JUSTIFICATION—CHALLENGING SUIT—COSTS.

See Costs, 3.

SOLICITOR.

1.—LIEN FOR COSTS — FUND IN COURT—PRIORITY OF PAYMENT—SET-OFF—JURISDICTION OF MASTER—GENERAL DIRECTIONS.

In a suit for construction of a will and administration of testator's estate, where the land of the estate had been sold and the proceeds paid into court, J. J. B., a beneficiary under the will and entitled to a share in said fund, was ordered personally to pay certain costs to other beneficiaries.

Held, reversing the decision of the Court of Appeal, that the solicitor of J. J. B. had a lien on the fund in court for his costs as between solicitor and client in priority to the parties who had been allowed costs against J. J. B. personally.

Held, also, that the referee before whom the administration proceedings were pending had no authority to make an order depriving the solicitor of his lien, not having been so directed by the administration order and no general order permitting such an interference with the solicitor's *primâ facie* right to the fund.

Bell v. *Wright* .. .. xxiv., 656

2.—INSOLVENCY—FRAUDULENT PREFERENCES —CHATTEL MORTGAGE — ADVANCES OF MONEY — SOLICITOR'S KNOWLEDGE OF CIRCUMSTANCES.

See Debtor and Creditor, 12.

SPECIFIC PERFORMANCE.

1.—AGREEMENT TO CONVEY LAND—DEFECT OF TITLE—WILL—DEVISE OF FEE WITH RESTRICTION AGAINST SELLING—SPECIAL LEGISLATION—COMPLIANCE WITH PROVISIONS OF.

The appeal was from a decision of the Court of Appeal for Ontario, affirming the judgment of the Queen's Bench Division in favour of the plaintiff. Land was devised to Northcote with a provision in the will that he should not sell or mortgage it during his life, but might devise it to his children. Northcote agreed in writing to sell the land to Vigeon, who was not satisfied as to Northcote's power to give a good title, and the latter petitioned under the Vendors and Purchasers Act for a declaration of the court thereon. The court held that the will gave Northcote the land in fee with a valid restriction against selling or mortgaging. [*In re Northcote*, 18 O. R. 107]. Northcote then asked Vigeon to wait until he could apply for special legislation to enable him to sell, to which Vigeon agreed, and thenceforth paid interest on the proposed purchase money. Northcote applied for a special Act which was passed giving him power, notwithstanding the restriction in the will, to sell the land and directing that the purchase money should be paid to a trust company. Prior to the passing of this Act Northcote, in order to obtain a loan on the land, had leased it to a third party, and the lease was mortgaged, and Northcote afterwards assigned his reversion of the land.

In an action by Vigeon for specific performance of the contract with her, defendant claimed that the contract was at an end when the judgment on the petition was given, and that if performance were decreed the amount due on the mortgage should be paid to him and only the balance to the trust company.

The Supreme Court held, affirming the decision of the Court of Appeal, that it was not open to Northcote to attack the decision of the Chancellor on the petition under the Vendors and Purchasers Act; that if it were, and that decision should be overruled, Vigeon would be all the more entitled to specific performance; that the evidence showed the lease granted by Northcote to have been merely colorable and an attempt to raise money on the land by indirect means; and that the decree should go for specific performance the whole purchase money to be paid in to a trust company.

Northcote v. *Vigeon*, 20th February, 1893, xxii., 740

2.—CONTRACT—TITLE TO LAND—OBJECTIONS TO TITLE—WAIVER.

To entitle a party to a contract to a decree for specific performance, he must have been prompt himself in performance of the obligations devolving upon him and always ready to carry out the contract within a reasonable time, even although time might

not have been of the essence of the agreement.

Specific performance will not be decreed when the party asking performance has declared his inability to carry out the agreement on his part.

A purchaser of land who takes possession of the property and exercises acts of ownership by making repairs and improvements will be held to have waived any objections to the title.

Objections to title cannot be raised where the purchaser has made a tender of a blank deed of mortgage for execution for the purpose of carrying out the purchase.

Wallace et al. v. *Hesslein et al.*, 21st November, 1898 .. .. xxix.

3.—Contract for Purchase of Land—Agreement to Pay Interest—Delay—Default of Vendor.

See Vendor and Purchaser, 2.

4.—Agreement for Services—Remuneration—Relationship of Parties.

See Contract, 14.

5.—Vendor and Purchaser — Sale of Lands—Waiver of Objections—Lapse of Time—Will, Construction of—Executory Devise Over—Defeasible Title—Rescission of Contract.

See Vendor and Purchaser, 6.

STATUTE.

1.—Construction of—54 & 55 Vic. c. 25—Appeal to Supreme Court.

Held, per Strong, C.J., and Fournier and Sedgewick, JJ., that the right of appeal given by 54 & 55 Vic. c. 25, does not extend to cases standing for judgment in the Superior Court prior to the passing of the said Act. *Couture* v. *Bouchard*, 21 Can. S. C. R. 181, followed. Taschereau and Gwynne, JJ., dissenting.

Per Fournier, J.—That the statute is not applicable to cases already instituted or pending before the courts, no special words to that effect being used.

Williams v. *Irvine* .. .. xxii., 108

2.—Construction of—Title to Land—Tenant for Life—Conveyance to Railway Company by—Railway Acts—C. S. C. c. 66, s. 11, s.s. 1—24 Vic. c. 17, s. 1.

By C. S. C. c. 66, s. 11 (Railway Act), all corporations and persons whatever, tenants in tail or for life, *grèves de substitution*, guardians, etc., not only for and on behalf of themselves, their heirs and successors, but also for and on behalf of those whom they represent * * * seized, possessed of or interested in any lands, may contract for, sell and convey unto the company (railway company) all or any part thereof; and any contract, etc., so made shall be valid and effectual in law.

Held, affirming the decision of the Court of Appeal, that a tenant for life is authorized by this Act to convey to a railway company in fee, but the company must pay to the remainderman or into court the proportion of the purchase money representing the remainderman's interest.

Midland Railway of Canada v. *Young*, xxii., 190

3.—Construction of—Married Woman's Property — Separate Estate — Contract by Married Woman—Separate Property Exigible—C. S. U. C. c. 73—35 Vic. c. 16 (O.)—R. S. O. (1877) cc. 125 and 127—47 Vic. c. 19 (O.).

A woman married between 1859 and 1872 acquired, in 1879 and 1882, lands in Ontario as her separate property, and in 1887, before the Married Woman's Property Act of that year (R. S. O. c. 132), came into force, she became liable on certain promissory notes made by her.

Held, reversing the decision of the Court of Appeal, that the liability of her separate property to satisfy a judgment on said promissory notes depended on the construction of the Married Woman's Real Estate Acts of 1877 (R. S. O. cc. 125, 127), and The Married Woman's Property Act, 1884 (47 Vic. c. 19), read in the light furnished by certain clauses of C. S. U. C. c. 73); and that her capacity to sue and be sued in respect thereof carried with it a corresponding right on the part of her creditors to obtain the fruits of a judgment against her by execution on such separate property.

Moore v. *Jackson* .. .. xxii., 210

4.—Construction of—Municipal Corporation—By-law—Street Railway — Construction Beyond Limits of Municipality—Validating Act.

The Corporation of the Town of Port Arthur passed a by-law entitled "a by-law to raise the sum of $75,000 for street railway purposes, and to authorize the issue of debentures therefor," which recited, *inter alia*, that it was necessary to raise said sum for the purpose of building, etc., a street railway connecting the municipality of Neebing with the business centre of Port Arthur.

At that time a municipality was not authorized to construct a street railway beyond its territorial limits. The by-law was voted upon by the ratepayers and passed, but none was submitted ordering the construction of the work. Subsequently an Act was passed by the Legislature of Ontario in respect to the said by-law which enacted that the same "is hereby confirmed and declared to be valid, legal and binding on the town * * * and for all purposes, etc., relating to or affecting the said by-law any and all amendments of the Municipal Act * * * shall be deemed and taken as having been complied with."

Held, reversing the decision of the Court of Appeal, Taschereau, J., dissenting, that the said Act did not dispense with the requirements of ss. 504 and 505 of the Municipal Act requiring a by-law providing for the construction of the railway to be passed, but only confirmed the one that was passed as a money by-law.

Held, also, that an erroneous recital in the preamble to the Act that the Town Council had passed a construction by-law had no effect on the question to be decided.

Dwyer v. *Town of Port Arthur* .. xxii., 241

5.—Construction of—Reference to Title—Intention of Legislature—50 Vic. c. 23 (N. S.)—Application of.

In construing an Act of Parliament the title may be referred to in order to ascertain the intention of the legislature.

The Act of the Nova Scotia Legislature, 50 Vic. c. 23, vesting the title to highways and the lands over which the same pass in the Crown for a public highway, does not apply to the City of Halifax.

O'Connor v. *Nova Scotia Telephone Co.*, xxii., 276

6.—Ontario Municipal Act — Bridges — Width of Stream—R. S. O. (1887) c. 184, ss. 532, 534.

By the Ontario Municipal Act, R. S. O. [1887] c. 184, s. 532, the council of any county has "exclusive jurisdiction over all bridges crossing streams or rivers over one hundred feet in width within the limits of any incorporated village in the county, and connecting any main highway leading through the county," and by s. 534 the county council is obliged to erect and maintain bridges on rivers and streams of said width. On rivers or streams one hundred feet or less in width the bridges are under the jurisdiction of the respective villages through which they flow.

Held, reversing the decision of the Court of Appeal, that the width of a river at the level attained after heavy rains and freshets each year should be taken into consideration in determining the liability under the Act; the width at ordinary high-water mark is not the test of such liability.

Village of New Hamburg v. *The County of Waterloo* .. .. xxii., 296

7.—Ontario Assessment Act—Unauthorized Assessment—Validation—R. S. O. (1887) c. 193, s. 65.

Section 65 of the Ontario Assessment Act (R. S. O. [1887] c. 193), does not enable the Court of Revision to make valid an assessment which the statute does not authorize.

City of London v. *Watt* .. .. .. xxii., 300

8.—Application of—54 & 55 Vic. c. 25, s. 3—Appeal to Supreme Court.

The statute 54 & 55 Vic. c. 25, s. 3, which provides that "whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different," does not apply to cases in which the Superior Court has rendered judgment or to cases argued and standing for judgment (*en délibéré*) before that court, when the Act came into force. *Williams* v. *Irvine* (12 Can. S. C. R. 108), followed.

Cowan v. *Evans; Mitchell* v. *Trenholme; Mills* v. *Limoges* .. .. xxii., 331

9.—54 & 55 Vic. c. 25—Reference to Supreme Court.

Quære.—Per Taschereau, J.—Is sec. 4 of 54 & 55 Vic. c. 25, which purports to authorize a reference to the Supreme Court for hearing "or" consideration, *intra vires* of the Parliament of Canada?

In re Certain Statutes of the Province of Manitoba Relating to Education .. xxii., 577

10.—Constitutional Law—Local Legislature — Powers of Lieutenant — Governor.

Inasmuch as the Act 51 Vic. c. 5 (O.), declares that in matters within the jurisdiction of the Legislature of the Province, all powers, etc., which were vested in or exercisable by the Governors or Lieutenant-Governors of the several provinces before Confederation shall be vested in and exercisable by the Lieutenant-Governor of that Province, if there is no proceeding in dispute which has been attempted to be justified

under 51 Vic. c. 5 (O.), it is impossible to say that the powers to be exercised by the said Act by the Lieutenant-Governor are unconstitutional.

Gwynne, J., was of opinion that 51 Vic. c. 5 (O.), is *ultra vires* of the Provincial Legislature.

Attorney-General of Canada v. *Attorney-General of Ontario* .. .. xxiii., 458

11.—Criminal Law—Betting on Election—Stakeholder—R. S. C. c. 159, s. 9—Accessory—R. S. C. c. 145, s. 7.

R. S. C. c. 159, s. 9, provides *inter alia* that "every one who becomes the custodian or depositary of any money * * * staked, wagered or pledged upon the result of any political or municipal election * * * is guilty of a misdemeanour," and a sub-section says that "nothing in this section shall apply to * * * bets between individuals."

Held, reversing the decision of the Court of Appeal, Taschereau, J., dissenting, that the sub-section is not to be construed as meaning that the main section does not apply to a depositary of money bet between individuals on the result of an election; such depositary is guilty of a misdemeanour, and the bettors are accessories to the offence and liable as principal offenders. R. S. C. c. 145. *Reg.* v. *Dillon* (10 Ont. P. R. 352), overruled.

Walsh v. *Trebilcock* .. .. .. xxiii., 695

12.—Construction of—Quebec License Laws—55 & 56 Vic. c. 11, s. 26—City of Sherbrooke—Charter—55 & 56 Vic. c. 51, s. 55—Powers of Taxation.

By virtue of the first clause of a by-law passed under 55 & 56 Vic. c. 51, an Act consolidating the Charter of the City of Sherbrooke, the appellant was taxed five cents on the dollar on the annual value of the premises in which he carried on his occupation as a dealer in spirituous liquors, and in addition thereto, under clause three of the same by-law, was taxed a special tax of two hundred dollars also for the same occupation. Section 55 of the Act 55 & 56 Vic. c. 51, enumerates in sub-sections from *a* to *j* the kinds of taxes authorized to be imposed, sub-sec. (*b*) authorizing the imposition of a business tax on all trades, occupations, etc., based on the annual value of the premises, and sub-sec. (*g*) providing for a tax on persons, among others, of the occupation of the petitioner. At the end of sub-sec. (*g*) is the following: "the whole, however, subject to the provisions of the Quebec License Act." The Quebec License Act, (art. 927 R. S. Q.) limits the powers of taxation for any Municipal Council of a City to $200 upon holders of licenses.

Held, affirming the judgment of the court below, that the power granted by 55 & 56 Vic. c. 51, to impose the several taxes was independent and cumulative, and as the special tax did not exceed the sum of $200, the by-law was *intra vires*, the proviso at the end of sub-section (*g*) not applying to the whole section. Taschereau and Gwynne, JJ., dissenting.

Webster v. *The City of Sherbrooke*, xxiv., 268

13.—Municipal Corporation—Ditches and Watercourses Act, R. S. O. (1887) c. 220—Requisition for Drain—Owner of Land—Meaning of Term Owner.

By section 6 (*a*) of the Ditches and Watercourses Act of Ont. (R. S. O. [1887] c. 220), any owner of land to be benefited thereby may file with the clerk of a municipality a requisition for a drain if he has obtained "the assent in writing thereto of (including himself) a majority of the owners affected or interested."

Held, affirming the judgment of the Court of Appeal, that "owner" in this section does not mean the assessed owner; that the holder of any real or substantial interest is an "owner affected or interested"; and that a mere tenant at will can neither file the requisition nor be included in the majority required.

Quære.—If the person filing the requisition is not an owner within the meaning of that term are the proceedings valid if there is a majority without him?

Township of Osgoode v. *York* .. xxiv., 282

14. — Railway Co. — Agreement with Foreign Co.—Lease of Road for Term of Years—Transfer of Corporate Rights.

The Canada Southern Railway Co., by its charter and amendments thereto, has authority to enter into an agreement with any other railway company with respect to the traffic arrangements or the use and working of the railway or any part thereof, and by the Dominion Railway Act of 1879, it is authorized to enter into traffic arrangements and agreements for the management and working of its railway with any other railway company, in Canada or elsewhere, for a period of twenty-one years.

Held, reversing the decision of the Court of Appeal, that authority to enter into an agreement for the "use and working" or "management and working" of its road conferred upon the company a larger right

than that of making a forwarding agreement or of conferring running powers; that the company could lawfully lease a portion of its road to a foreign company and transfer to the latter all its rights and privileges in respect to such portion, and the foreign company in such case would be protected from liability for injury to property occurring without negligence in its use of the road so leased, to the same extent as the Canada Southern Railway Co. is itself protected.

Michigan Central Rd. Co. v. *Wealleans*, xxiv., 309

15.—Practice—Equity Suit—New Trial—Construction of Statute as to—Persona Designata—53 Vic. c. 4, s. 85 (N. B.).

53 Vic. c. 4, s. 85 (N. B.), relating to proceedings in equity, provides that in an equity suit "either party may apply for a new trial to the Judge before whom the trial was held."

Held, reversing the decision of the Supreme Court of New Brunswick, Taschereau, J., dissenting, that such application need not be made before the individual before whom the trial was had but could be made to a Judge exercising the same jurisdiction. Therefore, where the Judge in equity who had tried a case resigned his office an application for a new trial could be made to his successor. *Footner* v. *Figes* (2 Sim. 319), followed.

Bradshaw v. *Baptist Foreign Mission Board*, xxiv., 351

15*a*. — Constitutional Law — Dominion Government—Liability to Action for Tort—Injury to Property on Public Work—Non-feasance—39 Vic. c. 27 (D.) R. S. C. c. 40, s. 6—50 & 51 Vic. c. 16 (D.).

50 & 51 Vic. c. 16, ss. 16 and 58 confers upon the subject a new or enlarged right to maintain a petition of right against the Crown for damages in respect of a tort (Taschereau, J., expressing no opinion on this point).

By 50 & 51 Vic. c. 16, s. 16 (D.), the Exchequer Court is given jurisdiction to hear and determine, *inter alia*: "(*d*) Every claim against the Crown arising under any law of Canada" * * *

Held, per Strong, C.J., and Fournier, J., that the words "any claim against the Crown" in sub-sec. (*d*) without the additional words would include a claim for a tort; that the added words "arising under any law of Canada" do not necessarily mean any prior existing law or statute law of the Dominion, but might be interpreted as meaning the general law of any Province of Canada, and even if the meaning be restricted to the statute law of the Dominion the effect of s. 58 of 50 & 51 Vic. c. 16, is to reinstate the provision contained in s. 6 of the repealed Act R. S. C. c. 40, which gives a remedy for injury to property in a case like the present.

City of Quebec v. *The Queen* .. .. xxiv., 420

16.—Directory or Imperative Requirement—Municipal Corporation — Collection of Taxes—Delivery of Roll to Collector.—55 Vic. c. 48 (O.).

By sec. 119 of the Ontario Assessment Act (55 Vic. c. 48), provision is made for the preparation every year by the clerk of each municipality of a "collector's roll" containing a statement of all assessments to be made for municipal purposes in the year, and s. 120 provides for a similar roll with respect to taxes payable to the treasurer of the province. At the end of s. 120 is the following: "The clerk shall deliver the roll, certified under his hand, to the collector on or before the first day of October." * *

Held, affirming the decision of the Court of Appeal, that the provision as to delivery of the roll to the collector was imperative and its non-delivery was a sufficient answer to a suit against the collector for failure to collect the taxes.

Held, also, that such delivery was necessary in the case of the roll for municipal taxes provided for in the previous section as well as to that for provincial taxes.

Town of Trenton v. *Dyer* .. .. xxiv., 474

17.—Construction of—Retroactive Effect—Municipal Corporation — Turnpike Road Co.—Erection of Toll Gates—Consent of Corporation.

A turnpike road company had been in existence for a number of years and had erected toll gates and collected tolls therefor, when an Act was passed by the Quebec Legislature, 52 Vic. c. 43, forbidding any such company to place a toll or other gate within the limits of a town or village without the consent of the corporation. Section 2 of said Act provided that "this Act shall have no retroactive effect," which section was repealed in the next session by 54 Vic. c. 36. After 52 Vic. c. 43 was passed, the company shifted one of its toll gates to a point beyond the limits of the village, which limits were subsequently extended so as to

bring said gate within them. The corporation took proceedings against the company contending that the repeal of s. 2 of 52 Vic. c. 43, made that Act retroactive and that the shifting of the toll gate without the consent of the corporation was a violation of said Act.

Held, affirming the decision of the Court of Queen's Bench, that as a statute is never retroactive unless made so in express terms, sec. 2 had no effect and its repeal could not make it retroactive; that the shifting of the toll gate was not a violation of the Act, which only applied to the erection of new gates; and that the extension of the limits of the village could not affect the pre-existing rights of the company.

Village of St. Joachim de la Pointe Claire v. *The Pointe Claire Turnpike Road Co.*, xxiv., 486

18. — Construction of — British North America Act, ss. 112, 114, 115, 116, 118 —36 Vic. c. 30 (D.)—47 Vic. c. 4 (D.)— Provincial Subsidies — Half-yearly Payments—Deduction of Interest.

By section 111 of the British North America Act, Canada is made liable for the debt of each province existing at the union. By sec. 112, Ontario and Quebec are jointly liable to Canada for any excess of the debt of the Province of Canada at the time of the union over $62,500,000, and chargeable with 5 per cent. interest thereon. Sections 114 and 115 make a like provision for the debts of Nova Scotia and New Brunswick exceeding eight and seven millions respectively, and by sec. 116, if the debts of those provinces should be less than said amounts they are entitled to receive, by half-yearly payments in advance, interest at the rate of 5 per cent. on the difference. Section 118, after providing for annual payments of fixed sums to the several provinces for support of their governments, and an additional sum per head of the population, enacts that "such grants shall be in settlement of all future demands on Canada and shall be paid half-yearly in advance to each province, but the Government of Canada shall deduct from such grants, as against any province, all sums chargeable as interest on the public debt of that province in excess of the several amounts stipulated in this Act." The debt of the Province of Canada at the union exceeded the sum mentioned in s. 112, and on appeal from the award of arbitrators appointed to adjust the accounts between the Dominion and the Provinces of Ontario and Quebec;—

Held, affirming said award, that the subsidy of the Provinces under section 118 was payable from the 1st of July, 1867, but interest on the excess of debt should not be deducted until 1st January, 1868; that unless expressly provided interest is never to be paid before it accrues due; and that there is no express provision in the British North America Act that interest shall be deducted in advance on the excess of debt under section 118.

By 36 Vic. c. 30 (D.), passed in 1873, it was declared that the debt of the Province of Canada at the union was then ascertained to be $73,006,088.84, and that the subsidies should thereafter be paid according to such amount. By 47 Vic. c. 4, in 1884, it was provided that the accounts between the Dominion and the Provinces should be calculated as if the last mentioned Acts had directed that such increase should be allowed from the coming into force of the British North America Act, and it also provided that the total amount of the half-yearly payments which would have been made on account of such increase from July 1st, 1867, to January 1st, 1873, with interest at 5 per cent. from the day on which it would have been so paid to July 1st, 1884, should be deemed capital owing to the respective provinces bearing interest at 5 per cent. and payable after July 1st, 1884, as part of their yearly subsidies.

Held, affirming the said award, Gwynne, J., dissenting, that the last mentioned Acts did not authorize the Dominion to deduct interest in advance from the subsidies payable to the provinces half-yearly, but leaves such deduction as it was under the British North America Act.

Dominion of Canada v. *Provinces of Ontario and Quebec* .. .. xxiv., 498

19.—Construction of—Railway Act, 1888, s. 246 (3)—Railway Co.—Carriage of Goods—Special Contract—Negligence —Limitation of Liability for.

By section 246 (3) of the Railway Act, 1888 (51 Vic. c. 29 [D.]), "every person aggrieved by any neglect or refusal in the premises shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or its servants."

Held, affirming the decision of the Court of Appeal, that this provision does not disable a railway company from entering into a special contract for the carriage of goods and limiting its liability as to amount of damages to be recovered for loss or injury to such goods arising from negligence. *Vogel* v.

Grand Trunk Railway Co. (11 Can. S. C. R. 612), and *Bate* v. *Canadian Pacific Railway Co.* (15 Ont. App. R. 388) distinguished.

Robertson v. *The Grand Trunk Ry. Co.*, xxiv., 611

20. — CONSTRUCTION OF STATUTE — SPECIAL ACT—REPEAL OF BY GENERAL ACT—REPEAL BY IMPLICATION.

A general later statute (and *a fortiori* a Statute passed at the same time) does not abrogate an earlier special Act by mere implication.

The law does not allow an interpretation that would have the effect of revoking or altering a special enactment by the construction of general words, where the terms of the special enactment may have their proper operation without such interpretation.

City of Vancouver v. *Bailey* .. .. xxv., 62

21.—BY-LAW—PETITION TO QUASH—APPEAL —40 VIC. (QUE.) c. 29—53 VIC. (QUE.) c. 70—JUDGMENT QUASHING — APPEAL TO SUPREME COURT FROM—R. S. C. c. 135, s. 24 (*g*).

Section 439 of the Town Corporations Act (40 Vic. (Que.) c. 29), not having been excluded from the charter of the City of Ste. Cunégonde (53 Vic. c. 70) is to be read as a part of it and prohibits an appeal to the Court of Queen's Bench from a judgment of the Superior Court on a petition to quash a by-law presented under section 310 of said charter.

Where the Court of Queen's Bench has quashed such an appeal for want of jurisdiction no appeal lies to the Supreme Court of Canada from its decision.

City of Ste. Cunégonde v. *Gougeon et al.*, xxv., 78

22.—CONSTRUCTION OF STATUTE—55 VIC. c. 26, ss. 2 AND 4 (O.)—CHATTEL MORTGAGE—AGREEMENT NOT TO REGISTER—VOID MORTGAGE — POSSESSION BY CREDITOR.

By the Act relating to chattel mortgages (R. S. O. (1887) c. 125), a mortgage not registered within five days after execution is "void as against creditors," and by 55 Vic. c. 26, s. 2 (O.), that expression is extended to simple contract creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee for the general benefit of creditors within the meaning of the Act respecting assignments and preferences" (R. S. O. (1887) c. 124). By section 4 of 55 Vic. c. 26, a mortgage so void shall not, by subsequent possession by the mortgagee of the things mortgaged, be made valid as against persons who became creditors * * * before such taking of possession."

Held, reversing the decision of the Court of Appeal, that under this legislation a mortgage so void is void as against all creditors, those becoming such after the mortgagee has taken possession as well as before, and not merely as against those having executions in the Sheriff's hands at the time possession is taken, simple contract creditors who have commenced proceedings to set it aside and an assignee appointed before the mortgage was given; that the words "suing on behalf of themselves and other creditors," in the amending Act, only indicate the nature of proceedings necessary to set the mortgage aside, and that the same will enure to the benefit of the general body of creditors; and that such mortgage will not be made valid by subsequent taking of possession.

Clarkson et al. v. *McMaster* .. .. xxv., 96

23.—CONSTRUCTION OF STATUTE—BY-LAW—EXCLUSIVE RIGHT GRANTED BY—STATUTE CONFIRMING—EXTENSION OF PRIVILEGE—45 VIC. c. 79, s. 5 (QUE.)—C. S. C. c. 65.

In 1881 a municipal by-law of St. Hyacinthe granted to a company incorporated under a general Act (C. S. C. c. 65), the exclusive privilege for twenty-five years of manufacturing and selling gas in said city, and in 1882 said company obtained a special Act of incorporation (45 Vic. c. 79, Que.), s. 5 of which provided that all the powers and privileges conferred upon the said company, as organized under the said general Act, either by the terms of the Act itself or by resolution, by-law or agreement of the said City of St. Hyacinthe, are hereby reaffirmed and confirmed to the company as incorporated under the present Act, including their right to break up, etc., the streets * * * and in addition it shall be lawful for the company, in substitution for gas or in connection therewith, or in addition thereto, to manufacture, use and sell electric, galvanic or other artificial light, and to manufacture, store and sell heat and motive power derived either from gas or otherwise * * * with the same privileges, and subject to the same liabilities, as are applicable to the manufacture, use and disposal of illuminating gas under the provisions of this Act."

Held, affirming the decision of the Court of Queen's Bench, that the above section did not give the company the exclusive right for twenty-five years to manufacture and

sell electric light: that the right to make and sell electric light with the same privilege as was applicable to gas did not confer such monopoly, but gave a new privilege as to electricity entirely unconnected with the former purposes of the company and that the word "privilege" there used could be referred to the right to break up streets and should not, therefore, be construed to mean the exclusive privilege claimed.

Held, also, that it was a private Act notwithstanding it contained a clause declaring it to be a public Act, and the city was not a party nor in any way assented to it: and that in construing it the court would treat it as a contract between the promoters and the legislature and apply the maxim *verba fortius accipiuntur contra proferentem* especially where exorbitant powers are conferred.

La Compagnie pour l'Eclairage au gaz de St. Hyacinthe v. *La Compagnie des pouvoirs Hydrauliques de St. Hyacinthe* .. xxv., 168

24.—REGISTRY ACT, R. S. O. c. 114—MUNICIPAL BY-LAW, REGISTRATION OF —NOTICE.

R. S. O. (1877) c. 114, s. 83, providing that no lien, charge or interest affecting land shall be valid as against a registered instrument executed by the same party, his heirs or assigns, is not restricted to interests derived under written instruments susceptible of registration, but applies to all interests.

City of Toronto v. *Jarvis* .. .. xxv., 237

25.—PUBLIC HIGHWAY—46 VIC. (O.) c. 18—REGISTERED PLAN—DEDICATION—USER—CONSTRUCTION OF STATUTE—RETROSPECTIVE STATUTE—ESTOPPEL.

The right vested in a municipal corporation by 46 Vic. (O.), c. 18, to convert into a public highway a road laid out by a private person on his property, can only be exercised in respect of private roads, to the use of which the owners of property abutting thereon were entitled.

Gooderham v. *The City of Toronto*, xxv., 246

26.—MORTGAGE — MINING MACHINERY — REGISTRATION—FIXTURES —INTERPRETATION OF TERMS—BILL OF SALE—PERSONAL CHATTELS—R. S. N. S. (5 SER.) c. 92, ss. 1, 4 AND 10 (BILLS OF SALE)—55 VIC. (N. S.) c. 1, s. 143 (THE MINES ACT).

The "fixtures" included in the meaning of the expression "Personal chattels" by the tenth section of the Nova Scotia "Bills of Sale Act," are only such articles as are not made a permanent portion of the land and may be passed from hand to hand without reference to or in any way affecting the land, and the "delivery" referred to in the same clause means only such delivery as can be made without a trespass or a tortious Act.

An instrument conveying an interest in lands and also fixtures thereon does not need to be registered under the Nova Scotia "Bills of Sale Act" (R. S. N. S. 5 ser. c. 92), and there is now no distinction in this respect between fixtures covered by a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee.

Warner v. *Don et al.* .. .. .. xxvi., 388

27.—CONSTITUTIONAL LAW—MARITAL RIGHTS —MARRIED WOMAN—SEPARATE ESTATE —JURISDICTION OF NORTH-WEST TERRITORIAL LEGISLATURE — STATUTE—INTERPRETATION OF—40 VIC. C. 7, S. 3, AND AMENDMENTS—R. S. C. c. 40—N. W. TER. ORD. NO. 16 OF 1889.

The provisions of Ordinance No. 16 of 1889, respecting the personal property of married women, are *intra vires* of the Legislature of the North-West Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorized to legislate by the order of the Governor-General in Council passed under the provisions of "The North-West Territories Act."

The provisions of said Ordinance No. 16 are not inconsistent with sections 36 to 40, inclusively of "The North-West Territories Act," which exempt from liability for her husband's debts the personal earnings and business profits of a married woman.

The words "her personal property," used in the said Ordinance No. 16 are unconfined by any context, and must be interpreted not as having reference only to "the personal earnings" mentioned in s. 36, but to all the personal property belonging to a woman, married subsequently to the Ordinance, as well as to all the personal property acquired since then by women married before it was enacted. *Brittlebank* v. *Gray-Jones* (5 Man. L. R. 33), distinguished.

Conger v. *Kennedy* .. .. .. xxvi., 397

28.—MASTER AND SERVANT—NEGLIGENCE—ARTS. 3019-3053—ART. 1053 C. C.—CIVIL "QUEBEC FACTORIES ACT,"—R. S. Q. RESPONSIBILITY—ACCIDENT, CAUSE OF—CONJECTURE—EVIDENCE—ONUS OF PROOF —STATUTABLE DUTY, BREACH OF—POLICE REGULATIONS.

The provisions of the "Quebec Factories Act," (R. S. Q. arts. 3019 to 3053 inclusively), are intended to operate only as police

regulations and the statutable duties thereby imposed do not affect the civil responsibility of employers towards their employees as provided by the Civil Code.

The Montreal Rolling Mills Company v. *Corcoran* .. .. xxvi., 595

29.—Appeal from Court of Review—Appeal to Privy Council—Appealable Amount—54 & 55 Vic. c. 25 (D.), s. 3, s.s. 3 and 4—C. S. L. C. c. 77, s. 25—Arts. 1115, 1178 C. C. P.—R. S. Q. Art. 2311.

In appeals to the Supreme Court of Canada from the Court of Review (which, by 54 & 55 Vic. c. 25, s. 3, s.-s. 3, must be appealable to the Judicial Committee of the Privy Council), the amount by which the right of appeal is to be determined is that demanded, and not that recovered, if they are different. *Dufresne* v. *Guevremont* (26 Can. S. C. R. 216), followed.

Citizens Light and Power Co. v. *Parent*, xxvii., 316

30.—Mines and Minerals—Lease of Mining Areas—Rental Agreement—Payment of Rent—Forfeitures—R. S. N. S. (5 ser.) c. 7—52 Vic. c. 23 (N. S.).

By R. S. N. S. (5 ser.) c. 7, the lessee of mining areas in Nova Scotia was obliged to perform a certain amount of work thereon each year on pain of forfeiture of his lease, which, however, could only be effected through certain formalities. By an amendment in 1889 (52 Vic. c. 23), the lessee is permitted to pay in advance an annual rental in lieu of work, and by sub-sec. (*c*) the owner of any leased area may, by duplicate agreement in writing with the Commissioner of Mines, avail himself of the provisions of such annual payment and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By s. 7 all leases are to contain the provisions of the Act, respecting payment of rental and its refund in certain cases, and by s. 8 said s. 7 was to come into force in two months after the passing of the Act. Before the Act of 1889 was passed a lease was issued to E. dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, 1891, a rental agreement under the amending Act was executed, under which E. paid the rent for his mining areas for three years, the last payment being in May, 1893. On May 22nd, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year and issued a prospecting license to T. for the same areas. E. tendered the year's rent on June 9th, 1894, and an action was afterwards taken by the Attorney-General, on relation of E., to set aside said license as having been illegally and improvidently granted.

Held, affirming the judgment of the Supreme Court of Nova Scotia in such action, that the phrase "nearest recurring anniversary of the date of the lease" in sub-sec. (*c*) of s. 1, Act of 1889, is equivalent to "next or next ensuing anniversary," and the lease being dated on June 10th no rent for 1894 was due on May 22nd of that year, at which date the lease was declared forfeited, and E.'s tender on June 9th was in time. *Attorney-General* v. *Sheraton* (28 N. S. Rep. 492), approved and followed.

Held, further, that though the amending Act provided for forfeiture without prior formalities of the lease in case of non-payment of rent, such provision did not apply to leases existing when the Act was passed in cases where the holders executed the agreement to pay rent thereunder in lieu of work. The forfeiture of E.'s lease was, therefore, void for want of the formalities prescribed by the original Act.

Temple v. *The Attorney-General of Nova Scotia* .. .. xxvii., 355

31.—Revenue—Customs Duties—Imported Goods—Importation into Canada—Tariff Act—Construction—Retrospective Legislation—R. S. C. c. 32—57 & 58 Vic. c. 33 (D.)—58 & 59 Vic. c. 23 (D.).

By 57 & 58 Vic. c. 33, s. 4, duties are to be levied upon certain specified goods "when such goods are imported into Canada."

Held, reversing the judgment of the Exchequer Court, King and Girouard, JJ., dissenting, that the importation as defined by s. 150 of the Customs Act (R. S. C. c. 32) is not complete until the vessel containing the goods arrives at the port at which they are to be landed.—Section 4 of the Tariff Act, 1895 (58 & 59 Vic. c. 23), provided that "this Act shall be held to have come into force on the 3rd of May in the present year 1895." It was not assented to until July.

Held, that the goods imported into Canada on May 4th, 1895, were subject to duty under said Act.

The Queen v. *The Canada Sugar Refining Co.*, xxvii., 395

[On appeal to the Privy Council this decision was affirmed. See (1898) A. C. 735.]

32.—Master and Servant—Hiring of Personal Services—Municipal Corporation—Appointment of Officers—Summary Dismissal—Libellous Resolution—Difference in Text of English and French Versions of Statute—52 Vic. c. 79, s. 79 (Q.)—"A Discretion"—"At Pleasure."

The Charter of the City of Montreal, 1889 (52 Vic. c. 79), section 79 gives power to the City Council to appoint and remove such officers as it may deem necessary to carry into execution the powers vested in it by the charter, the French version of the Act stating that such powers may be exercised "*à sa discrétion*," while the English version has the words "*at its pleasure*."

Held, that notwithstanding the apparent difference between the two versions of the statute, it must be interpreted as one and the same enactment and the City Council was thereby given full and unlimited power in cases where the engagement has been made indefinitely as to duration, to remove officers summarily and without previous notice, upon payment only of the amount of salary accrued to such officer up to the date of such dismissal.

Davis v. *City of Montreal* .. .. xxvii., 539

33.—Estates Tail, Acts Abolishing—R. S. N. S. (1 ser.) c. 112—R. S. N. S. (2 ser.) c. 112—R. S. N. S. (3 ser.) c. 111—28 Vic. c. 2 (N. S.)—Will—Construction of—Executory Devise over—Dying without Issue—"Lawful Heirs"—"Heirs of the Body"—Estate in Remainder Expectant—Statutory Title—R. S. N. S. (2 ser.) c. 114, ss. 23 & 24—Title by Will—Conveyance by Tenant in Tail.

The Revised Statutes of Nova Scotia, 1851, (1 ser.) c. 112, provided as follows: "All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as fee simple." In the revision of 1858 (R. S. N. S. 2 ser. c. 112) the terms are identical. In 1864 (R. S. N. S. 3 ser. c. 111) the provision was changed to the following: "All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged to be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." This latter statute was repealed in 1865 (28 Vic. c. 2) when it was provided as follows: "All estates tail are abolished, and every estate which hitherto would have been adjudged a fee tail shall hereafter be adjudged a fee simple and may be conveyed or devised or descend as such." Z., who died in 1859, by his will, made in 1857, devised lands in Nova Scotia to his son, and in default of lawful heirs, with a devise over to other relatives, in the course of descent from the first donee. On the death of Z., the son took possession of the property as devisee under the will, and held it until 1891, when he sold the lands in question in this suit to the appellant.

Held, per Taschereau, Sedgwick and King, JJ., that notwithstanding the reference to "valid remainder" in the statute of 1851 all estates tail where thereby abolished, and further, that subsequent to that statute there could be no valid remainder expectant on an estate tail, as there could not be a valid estate tail to support such remainder.

Held, further, per Taschereau, Sedgwick and King, JJ., that in the devise over to persons in the course of descent from the first devisee, in default of lawful issue, the words "lawful heirs," in the limitation over, are to be read as if they were "heirs of his body"; and that the estate of the first devisee was thus restricted to an estate tail and was consequently, by the operation of the statute of 1851, converted into an estate in fee simple and could lawfully be conveyed by the first devisee.

Held, per Gwynne and Girouard, JJ., that estates tail having a remainder limited thereon were not abolished by the statutes of 1851 or 1864, but continued to exist until all estates tail were abolished by the statutes of 1865; that the first devisee, in the case in question, took an estate tail in the lands devised and having held them as devisee in tail up to the time of the passing of the Act of 1865, the estate in his possession was then, by the operation of that statute, converted into an estate in fee simple which could be lawfully conveyed by him.

Ernst v. *Zwicker* .. .. xxvii., 594

34.—Appeal—Jurisdiction—52 Vic. c. 37, s. 2 (D.)—Appointment of Presiding Officers—County Court Judges—55 Vic. c. 48 (Ont.)—58 Vic. c. 47 (Ont.)—Appeal from Assessment—Final Judgment.

By 52 Vic. c. 37, s. 2, amending "The Supreme and Exchequer Courts Act," an appeal lies in certain cases to the Supreme Court of Canada from courts "of last resort created under provincial legislation to

adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are appointed by provincial or municipal authority." By the Ontario Act, 55 Vic. c. 48, as amended by 58 Vic. c. 47, an appeal lies from rulings of municipal courts of revision in matters of assessment to the County Court Judges of the county court district where the property has been assessed. On an appeal from the decision of the County Court Judges under the Ontario statutes:

Held, King, J., dissenting, that if the County Court Judges constituted a "court of last resort" within the meaning of 52 Vic. c. 31, s. 2, the persons presiding over such court were not appointed by provincial or municipal authority, and the appeal was not authorized by the said Act.

Held, per Gwynne, J., that as no binding effect is given to the decision of the County Court Judges, under the Ontario Acts cited, the court appealed from was not a "court of last resort" within the meaning of 52 Vic. c. 37, s. 2.

Quære.—Is the decision of the County Court Judges a "final judgment" within the meaning of 52 Vic. c. 37, s. 2?

The City of Toronto v. *The Toronto Railway Co.* .. .. xxvii., 640

35.—51 Vic. c. 12, s. 51—Civil Service—Extra Salary—Additional Remuneration—Permanent Employees.

The Civil Service Amendment Act, 1888, (51 Vic. c. 12), by section 51, provides that "no extra salary or additional remuneration of any kind whatever shall be paid to any deputy-head, officer or employee in the Civil Service of Canada, or to any other person permanently employed in the public service of Canada."

Held, that reporters employed on the Hansard staff of the House of Commons of Canada, are persons subject to the operation of the statute quoted.

Held, further, that in the section referred to, the words "no extra salary or additional remuneration" apply only to payments which, if made, would be extra or additional to the salary or remuneration payable to an officer for services which, at the time of his acceptance of the appointment, could legitimately have been intended or expected to be within the scope of the ordinary duties of his office, although additional to them.

The Queen v. *Bradley* .. .. .. xxvii., 657

36.—Railways—51 Vic. c. 29, s. 262 (D.)—Railway Crossings—Packing Railway Frogs, Wing-rails, Etc.—Negligence.

The proviso of the fourth sub-section of section 262 of "The Railway Act" (51 Vic. c. 29 (D.).) does not apply to the fillings referred to in the third sub-section and confers no power upon the Railway Committee of the Privy Council to dispense with the filling in of the spaces behind and in front of railway frogs or crossings and the fixed rails of switches during the winter months.

Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 183) reversed.

Washington v. *Grand Trunk Ry. Co.*, xxviii., 184

(Memo.—On appeal to the Privy Council this decision was affirmed, 24th February, 1899.)

37.—Winding-up Act—Moneys Paid Out of Court—Order Made by Inadvertence—Jurisdiction to Compel Repayment—R. S. C. c. 129, ss. 40, 41, 94—Locus Standi of Receiver-General—55 & 56 Vic. c. 28, s. 2—Statute, Construction of.

The liquidators of an insolvent bank passed their final accounts and paid a balance, remaining in their hands, into court. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General for Canada, as trustee of the residue, intervened and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act.

Held, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene although the three years from the date of the deposit mentioned in the Winding-up Act had not expired.

Held, also, that even if he was not so entitled to intervene the provincial courts had jurisdiction to compel repayment into court of the moneys improperly paid out.

Hogaboom v. *The Receiver-General of Canada. In re The Central Bank of Canada*, xxviii., 192

38.—Civil Service—Superannuation—R. S. C. c. 18—Abolition of Office—Discretionary Power—Jurisdiction.

Employees in the Civil Service of Canada, who may be retired or removed from office under the provisions of the eleventh section of "The Civil Service Superannuation Act"

(R. S. C. c. 18), have no absolute right to any superannuation allowance under that section, such allowance being by the terms of the Act entirely in the discretion of the executive authority.

Balderson v. *The Queen* .. .. xxviii., 261

39.—Construction of Contract—12 Vic. c. 183, s. 20—Contract, Notice to Cancel—Gas Supply Shut off for Non-payment of Gas Bill on other Premises—Mandamus.

The Act to amend the Act incorporating the New City Gas Company of Montreal, and to extend its powers (12 Vic. c. 182), provides: "That if any person or persons, company or companies, or body corporate supplied with gas by the company, shall neglect to pay any rate, rent or charge due to the said New City Gas Company, at any of the times fixed for the payment thereof, it shall be lawful for the company or any person acting under their authority, on giving twenty-four hours previous notice, to stop the gas from entering the premises, service pipes, or lamps of any such person, company or body, by cutting off the service pipe or pipes, or by such other means as the company shall see fit, and to recover the said rent or charge due up to such time, together with the expenses of cutting off the gas, in any competent court, notwithstanding any contract to furnish for a longer time, and in all cases where it shall be lawful for the said company to cut off and take away the supply of gas from any house, building or premises, under the provisions of this Act, it shall be lawful for the company, their agents and workmen, upon giving twenty-four hours previous notice to the occupier or person in charge, to enter into any such house, building or premises, between the hours of nine o'clock in the forenoon and four in the afternoon, making as little disturbance and inconvenience as possible, and to remove, take and carry away any pipe, meter, cock, branch, lamp, fitting and apparatus, the property, and belonging to the said company."

Held, Taschereau, J., dissenting, that the powers given by the clause quoted are exorbitant and must be construed strictly; that the company has not been thereby vested with power to shut off gas from all the buildings and premises of the same proprietor or occupant, when he becomes in default for the payment of bills for gas consumed in one of them only; and that the provision that the notice to cut off must be given "to the occupier or person in charge," indicates that only premises so occupied and in default should suffer.

Cadieux v. *The Montreal Gas Company*, xxviii., 382

(Leave has been granted to appeal from this judgment to the Privy Council. See (1898) A. C. 718.)

40.—Public Works—Railways and Canals—R. S. C. c. 37, s. 23—Contracts Binding on the Crown—Goods Sold and Delivered on Verbal Order of Crown Officials—Supplies in Excess of Tender — Errors and Omissions in Accounts Rendered — Findings of Fact—Interest—Arts. 1067 & 1077 C. C.—50 & 51 Vic. c. 16, s. 33.

The provisions of the twenty-third section of the "Act respecting the Department of Railways and Canals" (R. S. C. c. 37), which require all contracts affecting that department to be signed by the Minister, the Deputy Minister or some person specially authorized, and countersigned by the secretary, have reference only to contracts in writing made by that department (Gwynne, J., *contra*).

Where goods have been bought by and delivered to officers of the Crown for public works, under orders verbally given by them in the performance of their duties, payment for the same may be recovered from the Crown, there being no statute requiring that all contracts by the Crown should be in writing. (Gwynne and King, JJ., *contra*).

The Queen v. *Henderson et al.* ..xxviii., 425

41.—Married Woman—Separate Property—Conveyance—Contracts—C. S. N. B. c. 72.

Section 1 of C. S. N. B. c. 72, which provides that the property of a married woman shall vest in her as her separate property, free from the control of her husband and not liable for payment of his debts, does not, except in the case specially provided for, enlarge her power for disposing of such property or allow her to enter into contracts which at common law would be void. *Moore* v. *Jackson* (22 Can. S. C. R. 210), referred to. *Lea* v. *Wallace et al.* (33 N. B. Rep. 492), reversed.

Wallace et al. v. *Lea* .. .. .. xxviii., 595

42.—Municipal Corporation—55 Vic. c. 42, ss. 397, 404, 467, 473 (Ont.) — City Separated from County — Maintenance of Court House and Gaol—Care and Maintenance of Prisoners.

No compensation can be awarded by arbitrators to a county council in respect of the

use, by a city separated from that county, of the court house and gaol unless the question is specifically referred to them by a by-law of each municipality.

A claim for compensation for the care and maintenance of prisoners stands, as far as the meaning to be given to the word "city" is concerned, upon the same basis as a claim for the use of the court house and gaol.

Judgment of the Court of Appeal for Ontario (24 Ont. App. R. 409), affirmed.

County of Carleton v. *City of Ottawa*, 18th March, 1898 .. .. xxviii., 606

43.—Patent of Invention—Canadian Patent—Expiration of Foreign Patent—R. S. C. c. 61, s. 8—55 & 56 Vic. c. 24, s. 1.

The Exchequer Court of Canada (6 Ex. C. R. 55), declared a certain patent to be a good, valid and subsisting patent, and that it had been infringed by the defendants, and held that, the expression "any foreign patent" occurring in the concluding clause of the eighth section of "The Patent Act," must be limited to foreign patents in existence when the Canadian patent was granted.

On Appeal, the Supreme Court of Canada affirmed the judgment of the Exchequer Court, and dismissed the appeal with costs.

Dreschel et al. v. *The Auer Incandescent Light Manufacturing Co.*, 14th June, 1898, xxviii., 608

43*a*.— Municipal Corporation — By-law — Construction of Statute—Art. 4529, R. S. Q.—Approval of Electors—Appeal as to Costs.

Under the provisions of Art. 4529 of the Revised Statutes of Quebec money by-laws for loans by town corporations require the approval of the majority both in number and in value of the municipal electors who are proprietors of real estate within the municipality, as ascertained from the municipal rolls.

Town of Chicoutimi v. *Price*, 12th October, 1898 .. .. xxix., 135

44. — Joint Stock Company — Irregular Organization — Subscription for Shares—Withdrawal — Surrender — Forfeiture — Duty of Directors — Powers — Cancellation of Stock — Ultra Vires—"The Companies Act"—"The Winding-up Act"—Contributories—Pleading.

After the issue of an order for the winding-up of a joint stock company, incorporated under "The Companies Act," (R. S. C. c. 119), a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company, as, under the provisions of the Act, such grounds may be taken only upon direct proceedings at the instance of the Attorney-General.

The powers given directors of a joint stock company under "The Companies Tct" (R. S. C. c. 119), as to forfeiture of shares for non-payment of calls, are intended to be exercised only when the circumstances of the shareholders render it expedient in the interests of the company, and they cannot be employed for the benefit of the shareholder.

Common v. *McArthur*, 14th December, 1898, xxix., 239

45. — Construction of — Controverted Elections Act—R. S. C. c. 9, s. 30—Judicial Discretion.

See Election Law, 2.

46.—Nova Scotia Railway Act—Tax on Railway — Exemption — Mining Co.—Construction of Railway by—R. S. N. S. 5 ser. c. 53.

See Railways, 2.

47.—54 & 55 Vic. c. 25, s. 3—Application of —Appeal to Supreme Court—Amount in Controversy.

See Appeal, 10.

48.—Railway Belt in British Columbia—Statutory Conveyance to Dominion—Pre-emption Prior to—Federal and Provincial Rights—Lands Act of 1873 and 1879 (B. C.)—47 Vic. c. 6 (D.).

See Constitutional Law, 1.

49.—R. S. N. S. 5 ser. c. 92, s. 4—Chattel Mortgage — Affidavit — Compliance with Statutory Form.

See Chattel Mortgage, 1.

50. — Manitoba Constitutional Act — Matters Relating to Education—Powers of Provincial Legislatures—Repeal—Right of Appeal to Governor-General in Council—33 Vic. c. 3, s. 22, s.s. 2 (D.)—B. N. A. Act, s. 93, s.s. 3.

See Constitutional Law, 3.

51.— Construction of—Foreshore — Property in—Right of C. P. R. Co. to Use—Jus Publicum—Access to Harbour.

See Foreshore.

52.—R. S. N. S. 5 ser. c. 92—Bills of Sale —Statutory Form—Compliance with.

See Chattel Mortgage, 2.

53.—53 Vic. c. 56, s. 18 (O.)—54 Vic. c. 46 (O.) — Constitutionality — Powers of Local Legislature.

See Constitutional Law, 7.

54.—R. S. N. S. 5 ser. c. 84—Registry—Indorsement on Lease—Lease for Lives—Protection.

See Lease, 1.

55.—Customs Duties—50 & 51 Vic. c. 39, Items 88 and 173—Exemption from Duty—Steel Rails for Use on Railways—Application to Street Railways.

See Customs Duties, 1.

56.—"Bills of Exchange Act, 1890"—"The Bank Act," R. S. C. c. 120—Constitutional Law — Obligations Binding on Provincial Legislatures—Government Expenditures — Negotiable Instrument — "Letter of Credit" — Powers of Executive Councillors.

See Constitutional Law, 11.

57. — Ex Post Facto Legislation — Special Tax.

See Municipal Corporation, 23.

58.—Canadian Waters—Property in Beds — Public Harbours — Erections in Navigable Waters — Interference with Navigation—Right of Fishing—Power to Grant—Riparian Proprietors—Great Lakes and Navigable Rivers—Operation of Magna Charta —Provincial Legislation—R. S. O. (1887) c. 24, s. 47—55 Vic. (O.) c. 10, ss. 5 to 13, 19 and 21—R. S. Q. Arts. 1375 to 1378.

See Fisheries, 2.

59.—Landlord and Tenant—R. S. O. (1887) c. 143, s. 28—Distress—Goods of Person Holding "Under" Tenant.

See Landlord and Tenant, 1.

60. — Appeal — Time Limit — Commencement of, Pronouncing or Entry of Judgment — Security — Extension of Time—Vacation—R. S. C. c. 135, ss. 40, 42, 46.

See Appeal, 49, 50.

61.— Repair of Streets — Pavements — Assessment of Owners — Double Taxation—24 Vic. c. 39 (N. S.)—53 Vic. c. 60, s. 14 (N. S.).

See Municipal Corporation, 27.

62.—Snow and Ice on Sidewalks—By-law —55 Vic. c. 42, s. 531 (Ont.)—57 Vic. c. 50, s. 13 (Ont.).

See Negligence, 25.

63. — Convention of 1818 — Fisheries — Three Mile Limit—Foreign Fishing Vessels—"Fishing"—59 Geo. III., c. 38 (Imp.)—R. S. C. c. 94 & c. 95.

See Fisheries, 3.

64.—Appeal—Jurisdiction—54 & 55 Vic. c. 25, s. 2—Expropriation—Death of Arbitrator—51 Vic. c. 29, ss. 156, 157 —Lapse of Time for Making Award—Art. 12 C. C.

See Railways, 17.

65.—Appeal—Jurisdiction—Future Rights —Alimentary Allowance—R. S. C. c. 135, s. 29, s.-s. 2; 54 & 55 Vic. c. 25, s. 3; 56 Vic. c. 29, s. 2.

See Appeal, 74.

66.—60 & 61 Vic. c. 34, s. 1 (D.)—Appeals from Ontario to Supreme Court of Canada—Matters in Controversy — Interest of Second Mortgagee—Surplus on Mortgage Sale.

See Appeal, 77.

67. — Insurance, Life — Conditions and Warranties—Indorsements on Policy Inaccurate Statements — Misrepresentations — Latent Disease — Material Facts—Cancellation of Policy —Return of Premium—Construction of Statute—55 Vic. c. 39, s. 33 (Ont.).

See Contract, 42.

" Insurance, Life, 4.

68. — Construction of Statute — 20 & 21 Vic. c. 54, s. 12 (Imp.)—Criminal Prosecution—Embezzlement of Trust Funds—Suspension of Civil Remedy—Stifling Prosecution—Partnership.

See Trusts, 11.

STATUTE OF ELIZABETH.

1.—Assignment for Benefit of Creditors Preferences—Chattel Mortgage—R. S. N. S. (5 ser.) c. 92, ss. 4, 5, 10.

An assignment is void under the statute of Elizabeth as tending to hinder or delay creditors if it gives a first preference to a firm of which the assignee is a member and provides for allowance of interest on a claim of said firm until paid, and the assignee is permitted to continue in the same possession and control of business as he previously had, though no one of these provisions taken by itself would have such effect.

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

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

Kirk v. *Chisholm* .. .. xxvi., 111

2.—Hindering or Delaying Creditors—Husband and Wife—Purchase of Land by Wife — Re-sale — Garnishment of Purchase Money for Husband's Debt.

See Practice, 19.

3.—Assignment for the Benefit of Creditors — Preferred Creditors—Money Paid under Voidable Assignment—Liability of Assignee—Hindering and Delaying Creditors.

See Assignment, 3.

4.—Insolvency—Pressure—Assignment of Expected Profits — Fraudulent Preferences — Assets Exigible in Execution.

See Fraudulent Preferences, 3.

5.—Assignment for Benefit of Creditors —Affidavit of Bona Fides—Preferences—Conditions of Deed.

See Fraudulent Conveyances.

6.—Assignment for Benefit of Creditors —Preferred Creditors—Money Paid under Voidable Assignment — Levy and Sale under Execution.

See Debtor and Creditor, 13.

STATUTE OF FRAUDS.

1.—Memorandum in Writing—Repudiating Contract by—29 Car. II., c. 3 .

A writing containing a statement of all the terms of a contract for the sale of goods requisite to constitute a memo. under the 17th section of the Statute of Frauds, may be used for that purpose though it repudiates the sale.

Martin v. *Haubner et al.* .. .. xxvi., 142

2.—Sale of Interest in Land—Agreement to Transfer Proceeds of Sale of Mine.

See Contract, 9.

STATUTE OF LIMITATIONS.

1.—Partnership Dealings—Laches and Acquiescence—Interest in Partnership Lands.

A judgment creditor of J. applied for an order for sale of the latter's interest in certain lands the legal title to which was in K., a brother-in-law and former partner of J. An order was made for a reference to ascertain J.'s interest in the lands and to take an account of the dealings between J. and K. In the Master's office K. claimed that in the course of the partnership business he signed notes which J. indorsed and caused to be discounted, but had charged against him, K., a much larger rate of interest thereon than he had paid, and he claimed a large sum to be due him from J. for such overcharge. The Master held that as these transactions had taken place nearly twenty years before K. was precluded by the Statute of Limitations and by laches and acquiescence from setting up such claim. His report was overruled by the Divisional Court and Court of Appeal on the ground that the partnership affairs never having been formally wound up the statute did not apply.

Held, reversing the decision of the Court of Appeal and restoring the Master's report, that K.'s claim could not be entertained: that there was, if not absolute evidence at least a presumption of acquiescence from the long delay; and that such presumption should not be rebutted by the evidence of the two partners considering their relationship and the apparent concert between them.

Tooth v. *Kittredge* .. .. xxiv., 287

2.—Error in Survey — Boundaries — Possession.

See Title to Land, 4.

3.—Title to Land—Actual Possession—Defective Documentary Title.

See Title to Land, 5.

4.—Trustees under Will — Disclaimer—Possession of Land.

See Will, 4.

STATUTE OF MAINTENANCE.

Title to Land—Crown Grant—Disseisin of Grantee — Tortious Possession—Conveyance to Married Woman—Effect of Execution of, by Husband—Statute of Maintenance, 32 Hen. VIII., c. 9—Statute of Limitations.

In 1828 certain land in Upper Canada was granted by the Crown to King's College. In 1841, while one M. who had entered on the land was in possession, King's College conveyed it to G. In 1849 G. conveyed to the wife of M., and M. signed the conveyance though not a party to it. In an action by the successors in title of M.'s wife to recover possession of the land the defendants, claiming title through M., set up the statute of limitations, alleging that M. had been in possession twenty years when the land was conveyed to his wife, and that the conveyance to G., in 1841, the grantor not being in possession, was void under the statute of maintenance, and G. had, therefore, nothing to convey in 1849.

Held, that it was not proved that the possession of M. began before the grant from the Crown, but assuming that it did M. could not avail himself of the estate of maintenance as he would have to establish disseisin of the grantor, and the Crown could not be disseised; nor would the statute avail as against the patentee as the original entry nor being tortious the possession would not become adverse without a new entry.

Held, further, that if the possession began after the grant, the deed to G. in 1841 was not absolutely void under the statute of maintenance, but only void as against the party in possession, and M. being in possession a conveyance to him would have been good under s. 4 of the statute, and the deed to his wife, a person appointed by him, was equally good.

Further, M. by his assent to the conveyance to his wife and subsequent acts was estopped from denying the title of his wife's grantor.

Webb v. *Marsh* .. .. xxii., 437

STATUTE OF MORTMAIN.

Will — Revocation — Revival — Codicil—Intention to Revive—Reference to Date—Removal of Executor—Statute of Mortmain—Will Executed under Mistake—Ontario Wills Act, R. S. O. (1887) c. 109—9 Geo. II., c. 36 (Imp.).

Held, per Gwynne and Sedgewick, JJ., that the Imperial Statute, 9 Geo. 2, c. 36 (the Mortmain Act), is in force in the Province of Ontario, the courts of that province having so held (*Doe d. Anderson* v. *Todd*, (2 U. C. Q. B. 82); *Corporation of Whitby* v. *Liscombe* (23 Gr. 1), and the legislature having recognized it as in force by excluding its operation from acts authorizing corporations to hold lands.

Macdonnell v. *Purcell*.

Cleary v. *Purcell* .. .. xxiii., 101

STOCK.

1.—In Company—Payment on—Appropriation of Payment by Directors—Portion Treated as Paid up—Formal Resolution.

See Company, 1.

2.—In Company—Consideration—Transfer of Property—Sale by Promoter to Company—Secret Profit—Winding-up—Contributory.

See Company, 2.

3.—Discount Shares—Calls for Balances — Powers — Ultra Vires — Fraud — Breach of Trust —Directors—Trustees—Contributories.

See Company, 7.

4.—Subscription for Shares—Forfeiture — Cancellation — Directors—Ultra Vires—Powers.

See Company, 8.

STREET RAILWAY.

1.—Street Railway Co.—Agreement with Municipality—Ex Majori Cautela.

See Contract, 6.

2.— Defective Appliances — Absence of Buffers on Tram Cars.

See Negligence, 18.

3.—Accident to Workman on the Line of Railway—Contributory Negligence—Looking out for the Cars—New Trial—Consent Order.

See Negligence, 19.

4.—Customs Duties — Exemptions from Duty—Steel Rails for Use on Railways.

See Customs Duties, 1.

SUBSTITUTION.

Will—Construction of—Donation—Partition, per Stirpes or per Capita—Usufruct — Alimentary Allowance — Accretion Between Legatees.

The late Joseph Rochon made his will in 1852 by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared:—"Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitères, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament."

Held, Gwynne, J., dissenting, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate (subject to the usufruct), to their children, which took effect at the death of the testator.

Held, also, that the charge of preserving the estate—"conserver le fonds"—imposed upon the testamentary executor could not be construed as imposing the same obligation upon the sisters who were excluded from the administration, or as having, by that term, given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct.

Held, further that the property thus devised was subject to partition between the children *per capita* and not *per stirpes*.

Robin v. *Duguay* .. .. xxvii., 347

2.—Title to Land—Entail—Life Estate—Fiduciary Substitution — Privileges and Hypothecs—Mortgage by Institute—Preferred Claim—Prior Incumbrancer—Vis Major—16 Vic. c. 25—Registry Laws — Practice—Sheriff's Sale — Chose Jugee—Parties—Estoppel—Sheriff's Deed—Deed Poll—Improvements on Substituted Property —Grosses Reparations—Art. 2172 C. C.—29 Vic. c. 26 (Can.).

The institute, *grevé de substitution*, in possession of land and curator to the substitution, upon judicial authority, mortgaged the lands under the provisions of the Act for the relief of sufferers by the great Montreal fire of 1852 (16 Vic. c. 25), for a loan which was expended in constructing buildings upon the property. On default in payment the mortgagee obtained judgment against the institute, and caused the lands to be sold in execution by the sheriff in a suit to which the curator had not been made a party.

Held, that, as the mortgage had been judicially authorized and was given special preference by the statute, superior to any rights or interests that might arise under the substitution, the sale by the sheriff in execution of the judgment so recovered discharged the lands from the substitution not yet open, and effectually passed the title to the purchaser for the whole estate, including that of the substitute as well as that of the *grevé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution against the said lands.

An institute, *grevé de substitution*, may validly affect and bind the interest of the substitute in real estate subject to a fiduciary substitution in a case where the bulk of the property has been destroyed by *vis major*, in order to make necessary and extensive repairs (*grosses réparations*), upon obtaining judicial authorization, and in such case the substitution is charged with the cost of the *grosses réparations*, the judicial authorization operates as *res judicata*, and the substitute called to the substitution is estopped from contestation of the necessity and expense of the repairs.

The sheriff seized and sold lands under a writ of execution against a defendant, described therein, and in the process of seizure and also in the deed by him to the purchaser, as *grevé de substitution*.

Held, that the term used was merely descriptive of the defendant, and did not limit the estate seized, sold or conveyed under the execution.

Held, further, per Taschereau, J., that article 2172 of the Civil Code of Lower Canada, as interpreted by the statute, 29 Vic. c. 26 (Can.) applies to hypothecs and charges only, and does not require renewal of registration for the preservation of rights in and titles to real estate.

Judgment of the Court of Queen's Bench affirmed, Taschereau and King, JJ., dissenting.

Chef dit Vadeboncœur v. *City of Montreal*, 13th October, 1898 .. .. xxix., 9

3.—Title to Land — Sheriff —Vacating Sale—Exposure to Eviction—Actio Condictio Indebiti—Petition—Refund of Price Paid—Prior Incumbrance—Substitution not yet Open—Discharge of Incumbrances.

The procedure by petition provided by the Code of Civil Procedure of Lower Canada for vacating sheriff's sales can be invoked only in cases where an action would lie. *The Trust and Loan Co.* v. *Quintal*, (2 Dor. Q. B. 190), followed.

The *actio condictio indebiti* for the recovery of the price paid by the purchaser for lands lies only in cases of actual eviction. Mere exposure to eviction is not sufficient ground for vacating a sheriff's sale.

The provisions of article 714 of the Code of Civil Procedure do not apply to sheriff's sales which have been perfected by payment of the price of adjudication and the execution of the deed, nor does that article give a right to have the sale vacated and the amount so paid refunded.

A sheriff's sale in execution of a judgment against the owner of lands, *grevé de substitution*, based upon an obligation in a mortgage having priority over the instrument by which the substitution was created, discharges the lands from the unopened substitution without the necessity of making the curator to the substitution a part to the proceedings. *Chef dit Vadeboncœur* v. *City of Montreal*, (29 Can. S. C. R. 9) followed.

Deschamps v. *Bury*, 14th December, 1898, xxix., 274

SUCCESSION.

1.—Acceptation of by Minor Subsequent to Action—Operation of.

The acceptation of a succession subsequent to action, and *pendente lite* on behalf of a minor as universal legatee has a retroactive operation.

Martindale v. *Powers* .. .. .. xxiii., 597

2.—Sale of Right by Co-heir—Insolvency of Co-heir—Sale by Curator—Retrait Successoral—Art. 710 C. C.—Prescription.

See Retrait Successoral.

3.—Testamentary Executors — Balance Due by Tutor—Practice—Action for Account — Provisional Possession — Envoie en Possession — Parties — Extra-Judicial Consent to Form of Action.

See Executors, 2.

SURETY.

1.—Interference with Rights of Surety —Discharge.

The Union Bank agreed to discount the paper of S., A. & Co., railway contractors, indorsed by O'G., as surety, to enable them to carry on a railway contract for the Atlantic & North-West Ry. Co. O'G. indorsed the notes on an understanding or an agreement with the contractors and the bank that all moneys to be earned under the contract should be paid directly to the bank and not to the contractors, and an irrevocable assignment by the contractors of all moneys to the bank was in consequence executed. After several estimates had been thus paid to the bank it was found that the work was not progressing favourably, and the railway company then, without the assent of O'G., but with the assent of the contractors and the bank, guaranteed certain debts due to creditors of the contractors and out of moneys subsequently earned by the contractors made large payments for wages, supplies and provisions necessary for carrying on the work. In October, 1888, the bank, also without the assent of O'G., applied for and got possession of a cheque of $15,000, which had been accepted by the bank and held by the company as security for the due performance of the contract, in consideration of signing a release to the railway company "for all payments heretofore made by the company for labour employed on said contract and for material and supplies which went into the work." The contract under certain circumstances gave the right to the company to employ men and additional workmen, etc., as they might think proper, but did not give the right to guarantee contractors' debts or pay for provisions and food, etc.

Held, that there was such a variation of the rights of O'G. as surety as to discharge

him. Taschereau and Gwynne, JJ., dissenting.

O'Gara v. *The Union Bank of Canada*, xxii., 404

Memo.—(An appeal to the Privy Council was dismissed for want of prosecution. See "Canadian Gazette," vol. 24, page 224).

2.—Surety — Discharge of — Reservation of Rights Against—Promissory Note—Discharge of Maker.

Where the holder of a promissory note had agreed to accept a third party as his debtor in lieu of the maker.

Held, affirming the judgment of the Court of Appeal, that as according to the evidence there was a complete novation of the maker's debt secured by the note and a release of the maker in respect thereof, the indorsers on the note were also released.

Holliday v. *Jackson & Hallett* .. xxii., 479

3.—Insurance—Guarantee—Notice to Insurer of Defalcation—Diligence.

A guarantee policy insuring the honesty of W., an employee, was granted upon the express conditions, (1) that the answers contained in the application contained a true statement of the manner in which the business was conducted and accounts kept, and that they would be so kept, and (2) that the employers should, immediately upon its becoming known to them, give notice to the guarantors that the employee had become guilty of any criminal offence entailing or likely to entail loss to the employers and for which a claim was liable to be made under the policy. There was a defalcation in W.'s accounts, and the evidence showed that no proper supervision had been exercised over W.'s books, and the guarantors were not notified until a week after employers had full knowledge of the defalcation, and W. had left the country.

Held, affirming the judgment of the court below, that as the employers had not exercised the stipulated supervision over W., and had not given immediate notice of the defalcation, they were not entitled to recover under the policy.

Harbour Commissioners of Montreal v. *The Guarantee Company of North America*, xxii., 542

4.—Mortgage—Discharge—Action on Promissory Note—Security for Mortgage Debt.

A. and B., partners in business, borrowed money from C., giving him as security their joint and several promissory note and a mortgage on partnership property. The partnership having been dissolved A. assumed all the liabilities of the firm, and continued to carry on the business alone. After the dissolution C. gave A. a discharge of the mortgage, but without receiving payment of his debt, and afterwards brought an action against B. on the promissory note.

Held, that by the terms of the dissolution of partnership the relations between A. and B. were changed to those of principal and surety, and it having been found at the trial that C. had notice of such change his release of the principal, A., discharged B., the surety, from liability for the debt.

Allison v. *McDonald* .. .. .. xxiii., 635

And *see* Principal and Surety.

TAXES.

1.—Street Railway Co.—Repair of Roadway—Local Improvements — Termination of Franchise.

See Assessment, 3.

2.—Street Railway Co.—Payment for Horse-cars — Municipal By-law—Tax on Working Horses.

See Assessment, 4.

3.—Special Tax—Ex Post Facto Legislation—Warranty.

See Assessment, 6.

4.—Constitutional Law—Powers of Provincial Legislatures—Direct Taxation — Manufacturing and Trading Licenses — Distribution of Taxes—Uniformity of Taxation — Quebec Statues 55 & 56 Vic. c. 10 and 56 Vic. c. 15—British North America Act, 1867.

See Constitutional Law, 12.

5.—Municipal By-law — Special Assessments—Drainage—Powers of Councils as to Additional Necessary Work—Ultra Vires Resolutions—Executed Contract.

See Assessment, 7.

6. — Local Improvements — Repair of Streets — Pavements — Double Taxation—Assessment of Owner—24 Vic. (N. S.) c. 39—53 Vic. (N. S.) c. 60, s. 14.

See Municipal Corporation, 27.

7.— Municipal Corporation — By-law — Assessment — Local Improvements — Agreement with Owners of Property —Construction of Subway—Benefit to Lands.

See Municipal Corporation, 28.

8.—Appeal—Local Improvements—Assessment — Expropriation of Land — Future Rights.

See Appeal, 51.

And *see* Assessment and Taxes.

TENANT.

Drainage Scheme—Injury to Land by—Right to Recover Damages.

See Municipal Corporation, 10.

TENANT FOR LIFE.

1.—Conveyance to Railway Co. by—Railway Acts—C. S. C. c. 66, s. 11, s.-s. 1—24 Vic. c. 17, s. 1 (O.).

See Railway, 1.

2.—Will — Construction of — Words of Futurity—Joint Lives—Time for Ascertainment of Class — "Lawful Heirs" — Survivor Dying without Issue.

See Will, 18.

TENANT IN COMMON.

Will—Devise to Two Sons—Devise over of One's Share—Condition—Context—Codicil.

See Will, 11.

TENANT IN TAIL.

Statute, Construction of—Estates Tail, Acts Abolishing—R. S. N. S. (1 ser.) c. 112—R. S. N. S. (2 ser.) c, 112—R. S. N. S. (3 ser.) c. 111—28 Vic. c. 2 (N. S.)—Will — Construction of—Executory Devise Over—"Dying without Issue"—"Lawful Heirs"—"Heirs of the Body"—Estate in Remainder Expectant—Statutory Title—R. S. N. S. (2 ser.) c. 114, ss. 23 and 24—Title by Will—Conveyance by Tenant in Tail.

See Will, 17.

And *see* Substitution.

TERMS, INTERPRETATION OF.

1.—"At and from a Port."

See Insurance, Marine, 3.

2.—"Never Indebted."

See Action, 5.

3.—"Buildings and Erections" — "Improvements."

See Lessor and Lessee, 2.

4.—"Dying without Issue"—"Revert"—Contingencies — Executory Devise Over.

See Codicil, 2.

" Will, 10, 11, 12.

5.—"Poor" — "Poor Relatives"—"Public Protestant Charities."

See Will, 8.

6.—"Conserver le Fonds"—"Fournir les Revenus."

See Will, 15.

7.—"Heirs of the Body" — "Lawful Heirs"—"Valid Remainder."

See Heirs, 17.

8.—"Law of Canada"—50 & 51 Vic. c. 16, s. 16 (D.)

See Statute, 15

9.—"Void as Against Creditors"—"Suing on Behalf of Themselves and Other Creditors."

See Statute, 22.

10.—"Privileges"—45 Vic. c. 79, s. 5 (Que).

See Statute, 23.

11.—"Delivery" — "Fixtures" — "Personal Chattels"—Nova Scotia "Bills of Sale Act."

See Statute, 26.

12.—"Nearest Recurring Anniversary" —52 Vict. c. 23 (N. S.).

See Statute, 30.

13.—"Court of Last Resort"—52 Vic. c. 37 (D.)

See Statute, 34.

14.—"Extra Salary"—"Additional Remuneration"—The Civil Service Act.

See Statute, 35.

TERRITORIAL DIVISIONS.

Habeas Corpus — Jurisdiction—Form of Commitment—Judicial Notice—R. S. C. c. 135, s. 32.

See Justice of the Peace, 1.

TIME.

1. — Appeal — Time Limit — Commencement of—Pronouncing or Entry of Judgment — Security — Extension of Time—Order of Judge—R. S. C. c. 135, ss. 40, 42, 46.

See Vacation.

2. — Appeal — Time Limit — Commencement of—Pronouncing or Entry of Judgment — Security — Extension of Time—Order of Judge—R. S. C. c. 135, ss. 40, 42, 46.

See Appeal, 49, 50.

TITLE TO LAND.

1.—Municipal Corporation—Ownership of Roads and Streets — Rights of Private Property Owners — Ownership ad Medium Filum Viæ—R. S. N. S. 5 ser. c. 45—50 Vic. c. 23 (N. S.).

That the ownership of lands adjoining a highway extends *ad medium filum viæ* is a presumption of law only which may be rebutted but the presumption will arise though the lands are described in a conveyance as bounded by or on the highway. Gwynne, J., contra.

O'Connor v. *Nova Scotia Telephone Co.*, xxii., 276

2.—Action en Declaration d'Hypotheque — Translatory Title — Prescription under—Good Faith—Arts. 2251, 2202, 2253 C. C.—Judicial Admission—Art. 1245 C. C.—Art. 320 C. C. P.

The respondents having lent a sum of money to one Liboiron, subsequently, on the 9th May, 1876, took a transfer of his property by a deed *en dation de paiement*, in which the registered title deed of Liboiron to the same was referred to and by which it also appeared that the appellants had a *bailleurs de fonds* claim on the property in question. Liboiron remained in possession and sub-let part of the premises, collected the rents and continued to pay interest to the appellants for some years on the *bailleurs de fonds* claim. In 1887 the appellants took out an action *en déclaration d'hypothèque* for the balance due on their *bailleurs de fonds* claim. The respondents pleaded that they had acquired in good faith the property by a translatory title, and had become freed of the hypothec by ten years possession. Art. 2251 C. C.

Held, reversing the judgments of the courts below, that the oral and documentary evidence in the case as to the actual knowledge on the respondents' part of the existence of this registered hypothec or *bailleurs de fonds* claim was sufficient to rebut the presumption of good faith when they purchased the property in 1876, and therefore they could not invoke the prescription of ten years. Fournier, J., dissented.

In their declaration the appellants alleged that the respondents had been in possession of the property since 9th May, 1876, and after the *enquête* they moved the court to amend the declaration by substituting for the 9th May, 1876, the words "1st Dec., 1886." The motion was refused by the Superior Court, which held that the admission amounted to a judicial avowal from which they could not recede, and the Court of Queen's Bench affirmed this decision.

On appeal to the Supreme Court it was

Held, reversing the judgment of the court below, Fournier, J., dissenting, that the motion should have been allowed by the Superior Court so as to make the allegation of possession conform with the facts as disclosed by the evidence. Article 1245 C. C.

Baker v. *La Societé de Construction Métropolitaine* .. .. xxii., 364

3.—Crown Grant—Disseisin of Grantee—Tortious Possession—Conveyance to Married Woman—Effect of Execution of, by Husband—Statute of Maintenance, 32 Hen. VIII., c. 9—Statute of Limitations.

In 1828 certain land in Upper Canada was granted by the Crown to King's College. In 1841, while one, M., who had entered on the land was in possession, King's College conveyed it to G. In 1849 G. conveyed to the wife of M., and M. signed the conveyance though not a party to it. In an action by the successors in title of M.'s wife to recover possession of the land, the defendants, claiming title through M., set up the statute of limitations alleging that M. had been in possession twenty years when the land was conveyed to his wife, and that the conveyance to G., in 1841, the grantor not being in possession, was void under the statute of maintenance, and G. had, therefore, nothing to convey in 1849.

Held, that it was not proved that the possession of M. began before the grant from the Crown, but assuming that it did M. could not avail himself of the statute of maintenance as he would have to establish disseisin of the grantor, and the Crown

could not be disseised; nor would the statute avail as against the patentee as the original entry not being tortious the possession would not become adverse without a new entry.

Held, further, that if the possession began after the grant the deed to G. in 1841 was not absolutely void under the statute of maintenance, but only void as against the party in possession, and M. being in possession a conveyance to him would have been good under s. 4 of the statute, and the deed to his wife, a person appointed by him, was equally good. Further, M. by his assent to the conveyance to his wife and subsequent acts was estopped from denying the title of his wife's grantor.

Webb v. *Marsh* .. .. xxii., 437

4.—Old Survey—Error in—Boundaries—Possession—Statute of Limitations.

Appeals were taken from decisions of the Court of Appeal for Ontario affirming the judgments at the trial in favour of the respondent in each case. They had, respectively, brought actions against the appellant for trespass to land which were defended on the ground of want of title in the plaintiffs and title by possession in the defendant. At the trial evidence was given by plaintiff of a survey of the lands, and defendant's land adjoining, made in 1809, by a provincial land surveyor, in which, as he reported to the Crown Land Department, he had made a mistake owing to a bend in the circumference of his compass and which he corrected by moving the posts he had planted as the line was traced. The defendant claimed that the line as first run was the true line. As to possession the evidence was that defendant had cut timber on the land in dispute for many years, and also tapped maple trees for sugar, but had not fenced the land until some six or seven years prior to the action. The trial judge found that plaintiffs had respectively proved title to their land and that the acts of ownership shown by defendant were mere acts of trespass committed either wilfully or in ignorance as to boundaries and not such as would enable his possession to ripen into a title.

The Supreme Court affirmed the decision of the Court of Appeal in both cases and dismissed the appeals.

Horton v. *Casey; Horton* v. *Humphries*, 24th June, 1893 .. .. xxii., 739

5.—Disseisin—Adverse Possession—Paper Title—Joint Possession—Statute of Limitations.

A deed executed in 1856 purported to convey land partly in Lunenburg and partly in Queen's County, N. S., of which the grantor had been in possession up to 1850, when C. entered upon the portion in Lunenburg County, which he occupied until his death in 1888. The grantee under the deed never entered upon any part of the land, and in 1866 he conveyed the whole to a son of C., then about 24 years old, who resided with C., from the time he took possession. Both deeds were registered in Queen's County. The son shortly after married and went to live on the Queen's County portion. He died in 1872, and his widow, after living with C. for a time, married P. and went back to Queen's County. P. worked on the Lunenburg land with C. for a few years, when a dispute arose and he left. C. afterwards, by an intermediate deed, conveyed the land in Lunenburg County to his wife. On one occasion P. sent a cow upon the land in Lunenburg County, which was driven off, and no other act of ownership on that portion of the land was attempted until 1890, after C. had died, when P. entered upon the land and cut and carried away hay. In an action of trespass by C.'s widow for such entry the title to the land was not traced back beyond the deed executed in 1856.

Held, affirming the decision of the Supreme Court of Nova Scotia, that C.'s son not having a clear documentary title his possession of the land was limited to such part as was proved to be in his actual possession and in that of those claiming through him; that neither he nor his successors in title ever had actual possession of the land in Lunenburg County; that the possession of C. was never interfered with by the deeds executed; and having continued in possession for more than twenty years, C. had a title to the land in Lunenburg County by prescription.

Parks v. *Cahoon* .. .. xxiii., 92

6.—Boundaries — Road Allowance — Evidence.

The action was for possession of land, the parties being at issue as to the boundaries between their adjoining properties. The decision depended upon the existence or non-existence of a road allowance between the lots, and the trial judge held that proof of certain monuments having been placed on the lots by early surveyors was incompatible with its existence. His decision was reversed by the Court of Appeal for Ontario (21 Ont. App. R. 110).

The Supreme Court of Canada held that the evidence was sufficient to show that there was a road allowance; that the decl-

sion of the trial judge was rightly overruled, and dismissed the appeal with costs.

Caldwell v. *Kenny*, 15th Jan., 1895, xxiv., 699

7.—Boundaries—Evidence—Prescription.

The plaintiffs, the Rector and Wardens of St. Paul Church, London, Ont., brought the action for possession of land fenced in by defendants, who pleaded title to a part of the lands, and a right of way over the remainder. The Court of Appeal for Ontario (21 Ont. App. R. 323), reversed the decision of the Chancery Division and gave judgment for plaintiffs who, however, claimed a greater width of land than the judgment allowed and filed a cross-appeal to defendant's appeal from such judgment.

The Supreme Court of Canada affirmed the judgment appealed from and the appeal and cross-appeal were both dismissed with costs, the court adopting the reasoning of Mr. Justice Maclennan in the Court of Appeal.

Ferguson et al. v. *Innes et al.*, 11th March, 1895 .. .. xxiv., 703

8.—Possession — Crown Patent — Prior Grant—Prescription.

The action was for possession of land, plaintiffs claiming title by possession and defendants through a grant from the Crown in 1892, and a conveyance from the owner of adjoining land. It was shown that the Crown had granted this land before the beginning of the present century, and the courts below held that the Crown had nothing to grant in 1892, having by the prior grant parted with its title and never resumed it, and there was nothing to show that the owner of the adjoining land had any title to the locus.

The Supreme Court of Canada affirmed the judgment of the Supreme Court of Nova Scotia (57 N. S. Rep. 74), which had affirmed the trial court judgment, dismissing the plaintiff's action.

Chisholm et al. v. *Robinson et al.*, 11th March, 1895 .. .. xxiv., 704

9.—Action en Bornage—Surveyor's Report—Judgment on—Acquiescence in Judgment—Chose Jugee.

In an action *en bornage* between M. and B. a surveyor was appointed by the Superior Court to settle the line of division between the lands of the respective parties, and his report, indicating the position of the boundary line, was homologated, and the court directed that boundaries should be placed at certain points on said line. M. appealed from that judgment to the Court of Review claiming that the report gave B. more land than he claimed, and that the line should follow the direction of a fence between the properties that had existed for over thirty years. The Court of Review gave effect to this contention and ordered the boundaries to be placed according to it, in which judgment both parties acquiesced and another surveyor was appointed to execute it. He reported that he had placed the boundaries as directed by the Court of Review, but that his measurements showed that the line indicated was not the line of the old fence, and his report was rejected by the Superior Court. The Court of Review, however, held that the report of the first surveyor, having been homologated by the court, was final as to the location of the fence, and that the judgment had been properly executed. The Court of Queen's Bench reversed the judgment, set aside the last report and ordered the surveyor to place the boundaries in the true line of the old fence.

Held, reversing the decision of the Court of Queen's Bench, that the judgment of the Court of Review in which the parties acquiesced was *chose jugée* between them not only that the division line between the properties must be located on the line of the old fence but that such line was one starting at the point indicated in the plan and report of the first surveyor. The Court of Review was right, therefore, in holding that the surveyor executing the judgment could do nothing else than start his line at the said point.

Mercier et vir v. *Barrette* .. .. .. xxv., 94

10.—Seignorial Tenure—Deed of Concession—Construction of Deed—Words of Limitation—Covenant by Grantee—Charges Running with the Title—Servitude — Condition, si Voluero—Prescriptive Title—Edits & Ordonnances (L. C.)—Municipal Regulations—23 Vic. (Can.) c. 85.

In 1768 the Seigneur of Berthier granted an island called "l'ile du Milieu," lying adjacent to the "Common of Berthier," to M. his heirs and assigns (*ses hoirs et ayants cause*) in consideration of certain fixed annual payments and subject to the following stipulation: "en outre à condition qu'il fera a ses frais, *s'il le juge nécessaire*, une clôture bonne et valable, à l'épreuve des animaux de la Commune, sans aucun recours ni garantie à cet égard de la part du sieur seigneur, lesquelles conditions ont été acceptées du dit sieur preneur, pour sureté de quoi il a hypothéqué tous ses biens présents et à venir, et

spécialement la dite isle qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre."

Held, reversing the decision of the Court of Queen's Bench, Strong, C.J., dissenting, that the clause quoted did not impose merely a personal obligation on the grantee, but created a real change or servitude upon l'île du Milieu for the benefit of the "Common of Berthier."

That the servitude consisted in suffering inroads from the cattle of the Common wherever and whenever the grantee did not exclude them from his island by the construction of a good and sufficient fence.

This servitude results not only from the terms of the seignorial grant, but also from the circumstances and conduct of the parties from a time immemorial.

That the two lots of land although not contiguous were sufficiently close to permit the creation of a servitude by one in favour of the other.

That the stipulation as contained in the original grant of 1768 was not merely facultative.

That the servitude in question is also sufficiently established by the laws in force in Canada at the time of the grant in 1768, respecting fencing and the maintenance of fences in front of habitations or settlements.

La Commune de Berthier v. *Denis*, xxvii., 147

11. — Appeal — Jurisdiction — Petitory Action — Encroachment — Constructions Under Mistake of Title—Good Faith—Common Error—Demolition of Works—Right of Accession—Indemnity—Res Judicata—Arts. 412, 413, 429 *et seq.*, 1047, 1241 C. C

An action to revendicate a strip of land upon which an encroachment was admitted to have taken place by the erection of a building extending beyond the boundary line, and for the demolition and removal of the walls and the eviction of the defendant, involves questions relating to a title to land, independently of the controversy as to bare ownership, and is appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Act.

Where, as the result of a mutual error respecting the division line, a proprietor had in good faith and with the knowledge and consent of the owner of the adjoining lot, erected valuable buildings upon his own property and it afterwards appeared that his walls encroached slightly upon his neighbour's land, he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of reasonable indemnity.

In an action for revendication under the circumstances above mentioned, the judgment previously rendered in an action *en bornage* between the same parties cannot be set up as *res judicata* against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions were different.

An owner of land need not have the division line between his property and contiguous lots of land established by regular *bornage* before commencing to build thereon when there is an existing line of separation which has been recognized as the boundary.

Delorme v. *Cusson* .. .. xxviii., 66

12.—Form of Deed — Signature by a Cross—19 Vic. c. 15, s. 4 (Can.)—Registry Laws—Litigious Rights—Acquiescence — Evidence — Commencment of Proof—Warrantor Impeaching Title —Arts. 1025, 1027, 1472, 1480, 1487, 1582, 1583, 2134, 2137 C. C.

Where the registered owner of lands was present but took no part in a deed, subsequently executed by the representative of his vendor, granting the same lands to a third person, the mere fact of his having been present raises no presumption of acquiescence or ratification thereof.

The conveyance by an heir-at-law of real estate which had been already granted by his father during his lifetime is an absolute nullity and cannot avail for any purposes whatever against the father's grantee who is in possession of the lands and whose title is registered.

Writings under private seal which have been signed by the parties but are ineffective on account of defects in form, may nevertheless avail as a commencement of proof in writing to be supplemented by secondary evidence.

The grantees of the warrantors of a title cannot be permitted to plead technical objections thereto in a suit with the person to whom the warranty was given.

Where there is no litigation pending or dispute of title to lands raised except by a defendant who has usurped possession and holds by force, he cannot when sued set up against the plaintiff a defence based upon a purchase of litigious rights.

Powell v. *Watters* .. .. .. xxviii., 133

13. — Entail — Life Estate — Fiduciary Substitution — Privileges and Hypothecs—Mortgage by Institute—Preferred Claim—Prior Incumbrancer—Vis Major—16 Vic. c. 25—Registry Laws — Practice — Sheriff's Sale — Chose Jucee — Parties — Estoppel — Sheriff's Deed—Deed Poll—Improvements on Substituted Property — Grosses Reperations—Art. 2172 C. C. —29 Vic. c. 26 (Can.).

The institute, *grevé de substitution*, in possession of land and curator to the substitution, upon judicial authority, mortgaged the land under the provisions of the Act for the relief of sufferers by the great Montreal Fire of 1852 (16 Vic. c. 25), for a loan which was expended in reconstructing buildings upon the property. On default in payment the mortgagee obtained judgment against the institute, and caused the lands to be sold in execution by the sheriff in a suit to which the curator had not been made a party.

Held, that, as the mortgage had been judicially authorized and was given special preference by the statute, superior to any rights or interests that might arise under the substitution, the sale by the sheriff in execution of the judgment so recovered discharged the lands from the substitution not yet open, and effectually passed the title to the purchaser for the whole estate, including that of the substitute as well as that of the *grevé de substitution*, notwithstanding the omission to make the curator a party to the action or proceedings in execution against the said lands.

An institute, *grievé de substitution*, may validly affect and bind the interest of the substitute in real estate subject to a fiduciary substitution in a case where the bulk of the property has been destroyed by *vis major* in order to make necessary and extensive repairs (*grosses réparations*), upon obtaining judicial authorization, and in such case the substitution is charged with the cost of the *grosses réparations*, the judicial authorization operates as *res judicata*, and the substitute called to the substitution is estopped from contestation of the necessity and expense of the repairs.

The sheriff seized and sold lands under a writ of execution against a defendant described therein and in the process of seizure and also in the deed by him to the purchaser, as *grevé de substitution*.

Held, that the term used was merely descriptive of the defendant and did not limit the statute seized, sold or conveyed under the execution.

Held, further, per Taschereau, J., that article 2172 of the Civil Code of Lower Canada, as interpreted by the statute, 29 Vic. c. 26 (Can.), applies to hypothecs and charges only, and does not require renewal of registration for the preservation of rights in and titles to real estate.

Judgment of the Court of Queen's Bench affirmed, Taschereau and King, JJ., dissenting.

Chef dit Vaderboncœur v. *City of Montreal*, 13th Oct. 1898 .. .. xxix., 9

14.—Waiver—Objections to Title.

A purchaser who takes possession of the property and exercises acts of ownership by making repairs and improvements will be held to have waived any objections to the title.

Objections to title cannot be raised where the purchaser has made a tender of a blank deed of mortgage for execution for the purpose of carrying out the purchase.

Wallace et al. v. *Hesslein et al.*, 21st Nov., 1898 .. .. xxix., 171

15.—Tenant for Life—Conveyance to Railway Company by—Railway Acts—C. S. C. c. 66, s. 11, s.-s. 1—24 Vic. c. 17 s. 1 (O.).

See Statute, 2.

16.—Railway Belt in British Columbia—Unsurveyed Lands — Pre-emption — Federal and Provincial Rights.

See Constitutional Law, 1.

17.—Agreement to Convey — Defect in Title—Devise in Fee with Restriction Against Sale—Special Legislation — Specific Performance—Vendor and Purchaser.

See Specific Performance, 1.

18. — Trespass — Damages — Easement — Equitable Interest—Municipal By-law — Notice—Registration—R. S. O. (1877) c. 114.

See Municipal Corporation, 21.

19.—Public Highway—Private Roads—Registered Plan—Dedication—User—Construction of Statute—Retrospective Statute—Estoppel—46 Vic. (O.) c. 18.

See Municipal Corporation, 22.

20.—Vendor and Purchaser—Sale of Lands—Waiver of Objections—Lapse of Time—Will, Construction of—Executory Devise Over—Defeasible Title—Rescission of Contract.

See Will, 7.

21.—Mortgage of Trust Estate—Equity Running with Estate—Equitable Recourse—Construction of Deed—Description of Lands—Falsa Demonstratio—Water Lots—Accretion to Lands—After Acquired Title—Contribution to Redeem—Discharge of Mortgage—Parol Evidence to Explain Deed—Estoppel by Deed.

See Deed, 3.

22.—Constitutional Law — Province of Canada—Treaties with Indians—Surrender of Indian Lands—Charge upon Lands—B. N. A. Act, s. 109—Annuity to Indians—Revenue from Lands—Increase of Annuity.

See Constitutional Law, 13.

23.—Real Property Act—Registration—Unregistered Transfers — Equitable Rights—Sales under Execution—R. S. C. c. 51; 51 Vic. (D.) c. 20.

See Registry Laws, 3.

24. — Constitutional Law — Navigable Waters — Title to Alveus — Crown —Dedication of Public Lands—Presumption of Dedication — User — Obstruction to Navigation — Public Nuisance—Balance of Convenience.

See Constitutional Law, 15.

25.—Canadian Waters—Property in Beds — Public Harbours — Erections in Navigable Waters — Interference with Navigation—Right of Fishing—Power to Grant—Riparian Proprietors—Great Lakes and Navigable Rivers—Operation of Magna Charta —Provincial Legislation—R. S. O. (1887) c. 24, s. 47—55 Vic. (O.) c. 10, ss. 6 to 13, 19 and 21—R. S. Q. Arts. 1375 to 1378.

See Fisheries, 2.

26.—Right of Redemption—Third Parties —Delivery and Possession of Thing Sold.

See Pledge, 2.

27.—Ambiguous Description—Possession—Presumptions in Favour of Occupant.

See Deed, 6.

28.—Statute, Construction of—Estates Tail, Acts Abolishing—R. S. N. S. (1 ser.) c. 112—R. S. N. S. (2 ser.) c. 112—R. S. N. S. (3 ser.) c. 111—23 Vic. c. 2 (N. S.) — Will — Construction of — Executory Devise Over — "Dying without Issue"—"Lawful Heirs"—"Heirs of the Body"—Estate in Remainder Expectant—Statutory Title —R. S. N. S. (2 ser.) c. 114, ss. 23 and 24—Title by Will—Conveyance by Tenant in Tail.

See Will, 17.

29. — Sheriff's Deed — Nullity — Mala Fides—Prescription — Equivocal Possession.

See Evidence, 30.

30. — Appeal — Jurisdiction — Matter in Controversy — Interest of Second Mortgagee — Surplus on Sale of Mortgaged Lands—60 & 61 Vic. c. 34, s. 1 (D.)—Construction of Statute—Practice.

See Appeal, 77.

31.—Sheriff's Sale — Deed — Action to Vacate — Petition — Exposure to Eviction—Actio Condictio Indebiti—Refund of Price Paid—Substitution Not Yet Open—Prior Incumbrance—Arts. 706, 710, 714, 715 C. C. P.—Arts. 1511, 1535, 1586, 1591, 2060 C. C.

See Action, 18.
" Sheriff, 2.
" Substitution, 3.

TOLLS.

1.—Company — Forfeiture of Charter — Estoppel—Compliance with Statute—Action—Res Judicata.

In an action against a River Improvement Company for repayment of tolls alleged to have been unlawfully collected, it was alleged that the dams, slides, etc., for which tolls were claimed were not placed on the properties mentioned in the letters patent for the company; that the company did not comply with the statutory requirements that the works should be completed within two years from the date of incorporation, whereby the corporate powers were forfeited; that false returns were made to the Commissioner of Crown Lands, upon which the schedule of tolls was fixed; that the company by its works and improvements obstructed navigable waters, contrary to the provisions of the Timber Slide Companies Act, and could

not exact tolls in respect of such works. By a consent judgment in a former action between the same parties, it had been agreed that a valuator should be appointed by the Commissioner of Crown Lands whose report was to be accepted in place of that provided for by the Timber Slide Companies Act, and to be acted upon by the Commissioner in fixing the schedule of tolls.

Held, affirming the judgment of the Court of Appeal for Ontario, that the above grounds of impeachment were covered by the consent judgment, and were *res judicata*.

Held, further, that plaintiffs having treated the company as a corporation, using the works and paying the tolls fixed by the Commissioner, and having in the present action sued the company as a corporation, were precluded from impugning its legal existence by claiming that its corporate powers were forfeited.

By R. S. O. (1887), c. 160, s. 54, it was provided that if a company such as this did not complete its works within two years from the date of incorporation it should forfeit all its corporate and other powers" unless further time is granted by the county or counties, district or districts, in or adjoining which the work is situate, or by the Commissioner of Public Works.

Semble.—The non-completion of the works within two years would not *ipso facto*, forfeit the charter but only afford grounds for proceedings by the Attorney-General to have a forfeiture declared.

Another ground of objection to the imposition of tolls was that the Commissioner, in acting on the report of the valuator appointed under the consent judgment erroneously based the schedule of tolls upon the report as to expenditure instead of as to actual value, and the statement of claim asked that the schedule be set aside and a new scale of tolls fixed.

Held, that under the statute the schedule could only be altered or varied by the Commissioner, and the court could not interfere, especially as no application for relief had been made to the Commissioner.

Hardy Lumber Co. v. *Pickerel River Improvement Co.*, 14th December, 1898 .. xxix., 211

2.—Constitutional Law—Municipal Corporation—Powers of Legislature—License — Monopoly — Highways and Ferries—Navigable Streams—By laws and Resolutions — Intermunicipal Ferry — Tolls — Disturbance of License — North-west Territories Act, R. S. C. c. 50, ss. 13 and 24—B. N. A. Act (1867) s. 92, ss. 8, 10 and 16—Rev. Ord. N. W. Ter. (1888) c. 28—Ord. N. W. T. No. 7 of 1891-92, s. 4—Companies, Club Associations and Partnerships.

See Constitutional Law, 14.

TORTS.

Commencement of Prescription of Action—Continuing Damages—Liability of Employer for Act of Contractor.

See Master and Servant, 4.

TRADE.

1.—Partial Prohibition of—By-law of Municipal Council — Power to License, Regulate and Govern — Ontario Municipal Act, R. S. O. (1887) c. 184.

See Municipal Corporation, 6.

2.—Constitutional Law—Powers of Provincial Legislatures—Direct Taxation — Manufacturing and Trading Licenses—Distribution of Taxes—Uniformity of Taxation—Quebec Statutes 55 & 56 Vic. c. 10 and 56 Vic. c. 15—British North America Act, 1867.

See Constitutional Law, 12.

TRADE CUSTOM.

Contract for Sale of Goods—Place of Delivery — Inspection — Evidence of Mercantile Usage — Contract Made Abroad.

See Contract, 12.

TRADE MARK.

Jurisdiction of Court to Restrain Infringement—Effect of—Rectification of Register.

In the certificate of registration the plaintiffs' trade-mark was described as consisting of "the representation of an anchor, with the letters 'J. D. K. & Z.' or the words 'John DeKuyper & Son, Rotterdam, etc.,' as per the annexed drawings and application." In the application the trade-mark was claimed to consist of a device or representation of an anchor inclined from right to left in combination with the letters "J. D. K. & Z." or the words "John DeKuyper, etc., Rotterdam," which, it was stated might be branded or stamped upon barrels, kegs, cases, boxes, capsules, casks, labels and other packages containing geneva sold by plaintiffs. It was also stated in the application that on bottles was to be affixed a printed label, a copy or *fac-simile* of which was attached to the application, but there

was no express claim of the label itself as a trade-mark. This label was white and in the shape of a heart, with an ornamental border of the same shape, and on the label was printed the device or representation of the anchor with the letters "J. D. K. & Z.," and the words "John DeKuyper & Son, Rotterdam," and also the words "Genuine Hollands Geneva," which it was admitted were common to the trade. The defendants' trade-mark was, in the certificate of registration, described as consisting of an eagle having at the feet "V. D. W. & Co.," above the eagle being written the words "Finest Hollands Geneva;" on each side are the two faces of a medal, underneath on a scroll the name of the firm "Van Dulken Weiland & Co.," and the word "Schiedam," and lastly at the bottom the two faces of a third medal, the whole on a label in the shape of a heart (le tout sur une étiquette en forme de cœur). The colour of the label was white.

Held, affirming the judgment of the Exchequer Court, that the label did not form an essential feature of the plaintiffs' trade-mark as registered, but that, in view of the plaintiffs' prior use of the white heart-shaped label in Canada, the defendants had no exclusive right to the use of the said label, and that the entry of registration of their trade-mark should be so rectified as to make it clear that the heart-shaped label formed no part of such trade-mark. Taschereau and Gwynne, JJ., dissenting on the ground that the white heart-shaped label with the scroll and its constituents was the trade-mark which was protected by registration, and that the defendants' trade-mark was an infringement of such trade-mark.

DeKuyper v. *Van Dulken; Van Dulken* v. *DeKuyper* .. .. xxiv., 114

TRADE UNION.

Cause of Action—Combination in Restraint of Trade — Strikes—Social Pressure.

Workmen who in carrying out the regulations of a trade union forbidding them to work at a trade in company with non-union workmen, without threats, violence, intimidation or other illegal means, take such measures as result in preventing a non-union workman from obtaining employment at his trade in establishments where union workmen are engaged, do not hereby incur liability to an action for damages.

Judgment of the Court of Queen's Bench (Q. R. 6 Q. B. 65), affirmed.

Perrault v. *Gauthier et al.* .. .. xxviii., 241

TRANSACTION.

Compromise to Prevent Litigation — Nullified Instruments — Estoppel — Evidence—Admission—C. C. Arts. 311, 1243-1245 and 1918 *et seq.*

Where a deed entered into by the parties to a law suit in order to effect a compromise of family disputes and prevent litigation, failed to attain its end, and was annulled and set aside by order of the court as being in contravention of art. 311 of the Civil Code of Lower Canada, no allegation contained in the deed so annulled can subsist even as an admission.

Durocher v. *Durocher* .. .. .. xxvii., 363

TREATIES.

1.—Construction of—Convention of 1818 — Fisheries — Statute, Construction of—59 Geo. III., c. 38 (Imp.)—R. S. C. cc. 94 & 95—Three Mile Limit—Foreign Fishing Vessels—"Fishing."

Where fish has been enclosed in a seine more than three marine miles from the coast of Nova Scotia, and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached within the three mile limit, her crew being then engaged in the act of bailing the fish out of the seine:

Held, (the Chief Justice and Gwynne, J., dissenting), affirming the decision of the court below, that the vessel when so seized was "fishing" in violation of the convention of 1818 between Great Britain and the United States of America and of the Imperial Act 59 Geo. III., c. 38, and the Revised Statutes of Canada, c. 94, and consequently liable with the cargo, tackle, rigging, apparel, furniture and stores to be condemned and forfeited.

The Ship "Frederick Gerring, Jr.," v. *The Queen* .. .. xxvii., 271

2.—Treaties with Indians — Constitutional Law—Province of Canada—Indian Treaties — Surrender of Indian Lands—Annuity to Indians—Revenue from Indian Lands — Increase of Annuity — Charge upon Lands—British North America Act, 1867, s. 109.

See Constitutional Law, 13.

TRESPASS.

1.—On Public Streets—Action by Owner of Private Property—Ornamental Shade Trees—Ownership ad Medium Filum Viæ—Presumption.

The charter of the Nova Scotia Telephone Company authorizing the construction and

working of lines of telephone along the sides of, and across and under, any public highway or street of the City of Halifax provided that in working such lines the company should not cut down or mutilate any trees.

Held, Taschereau and Gwynne, JJ., dissenting, that the owner of private property in the city could maintain an action for damages against the company for injuring ornamental shade trees on the street in front of his property while constructing or working the telephone line, there being nothing in the evidence to rebut the presumption of ownership *ad medium*, or to show that the street had been laid out under a statute of the province or dedicated to the public before the passing of any expropriation act.

O'Connor v. *Nova Scotia Telephone Co.*, xxii., 276

2.—Trespass to Mortgaged Property—Parties to Action for—Owner of Equity of Redemption—Mortgagees out of Possession.

See Mortgage, 1.

3.—Railways — Regular Depot — Traffic Facilities—Railway Crossings—Negligence—Walking on the Line of Railway—Invitation—License—51 Vic. c. 29, ss. 240, 356, 373 (D.)

See Railways, 19.

TROVER.

Conversion of Vessel—Joint Owners—Marine Insurance — Abandonment — Salvage.

A sale by one joint owner of property does not amount, as against his co-owner, to a conversion unless the property is destroyed by such sale or the co-owner is deprived of all beneficial interest.

A vessel partly insured, was wrecked and the ship's husband abandoned her to the underwriters, who sold her and her outfit to one K. The sale was afterwards abandoned and the underwriters notified the ship's husband that she was not a total loss and requested him to take possesion. He paid no attention to the notice and the vessel was libelled by K. for salvage and sold under decree of court. The uninsured owner brought an action against the underwriters for conversion of her interest.

Held, affirming the decision of the Supreme Court of New Brunswick, that the ship's husband was agent of the uninsured owner in respect of the vessel and his conduct precluded her from bringing the action; that he might have taken possession before the vessel was libelled; and that the insured owner was not deprived of her interest by any action of the underwriters, but by the decree of the court under which she was sold for salvage.

Rourke v. *Union Ins. Co.* .. .. xxiii., 344

TRUSTS.

1.—Trusts—Will—Executors and Trustees—Breach of Trust—Presumption—Constructive Notice—Inquiry—Liability of Assignee.

After all the debts of an estate are paid, and after the lapse of years from the testator's death, there is a sufficient presumption that one of the several executors and trustees dealing with assets is so dealing *qua* trustee and not as executor, to shift the burden of proof. *Ewart* v. *Gordon* (13 Gr. 40), discussed.

W. and C. were executors and trustees of an estate, under a will. W., without the concurrence of C., lent money of the estate on mortgage, and afterwards assigned the mortgages which were executed in favour of himself, described as "trustee of the estate and effects of" (the testator). In the assignment of the mortgages he was described in the same way. W. was afterwards removed from the trusteeship and an action was brought by the new trustees against the assignees of the mortgages to recover the proceeds of the same.

Held, reversing the judgment of the Court of Appeal, that in taking and assigning said mortgages W. acted as a trustee and not as an executor; that he was guilty of a breach of trust in taking and assigning them in his own name; that his being described on the face of the instruments as a trustee was constructive notice to the assignees of the trusts, which put them on inquiry; and that the assignees were not relieved as persons rightfully and innocently dealing with trustees, inasmuch as the breach of trust consisted in the dealing with the securities themselves and not in the use made of the proceeds.

Cumming v. *Landed Banking & Loan Co.*, xxii., 246

2.—Trustee—Administrator of Estate—Release to, by Next of Kin—Rescission of Release—Laches.

The appeal was from a decision of the Supreme Court of Nova Scotia, reversing the judgment at the trial for the defendants. E. M. died in 1871, and his brother and partner, H. M., obtained from his widow and his father, as next of kin, a release of

their respective interests in all real and personal property of the deceased. In getting this release he represented that the estate would be sacrificed if sold at auction, and the most could be made of it by letting him have full control of the property. He then took out letters of administration to E. M.'s estate, but took no further proceedings in the Probate Court, and managed the property as his own until he died in 1888. During that time he wrote several letters to the widow of E. M., in most of which he stated that he was dealing with the property for her benefit, and would see that she lost nothing by giving him control of it. After his death the widow brought an action against his executors, asking for an account of the partnership between her husband and H. M., and of his dealings with the property since her husband's death and payment of her share; she also asked to have the release set aside. The defendants relied on the release as valid, and also pleaded that plaintiff by delay in pressing her claims was precluded from maintaining her action.

The Supreme Court of Canada held, Gwynne, J., dissenting, that the release should be set aside; that it was given in ignorance of the state of the partnership business and E. M.'s affairs, and the plaintiff was dominated by the stronger will of H. M.; that the latter had divested himself of his legal title by admitting in his letters a liability to the plaintiff, and must be treated as a trustee; that as a trustee lapse of time would not bar plaintiff from proceeding against him for breach of trust; and that the delay in pressing plaintiff's claim was due to H. M. himself, who postponed from time to time the giving of a statement of the business when demanded by the plaintiff. The appeal was dismissed with costs.

Mack v. *Mack*, 13th March, 1894, xxiii., 146

3.—Executors and Trustees—Accounts—Jurisdiction of Probate Court—Res Judicata—Misconduct—Judicial Discretion—Removal of Trustee.

A court of probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other court, and a court of equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the Probate Court.

The Supreme Court of Canada, on appeal from a decision that the said charges were properly disallowed, will not reconsider the items so dealt with, two courts having previously exercised a judicial discretion as to the amounts and no question of principle being involved.

A letter written by a trustee under a will to the *cestui que trusts* threatening in case proceedings are taken against him to make disclosures as to malpractices by the testator, which might result in heavy penalties being exacted from the estate, is such an improper act as to call for his immediate removal from the trusteeship.

Grant v. *Maclaren* .. .. xxiii., 310

4.—Trust Under Will—Infancy—Disclaimer—Possession of Land—Statute of Limitations.

A son of the testator and one of the executors and trustees named in a will was a minor when his father died, and after coming of age he never applied for probate, though he knew of the will and did not disclaim. With the consent of the acting trustee he went into possession of a farm belonging to the estate and remained in possession over twenty years, and until the period of distribution under the clause above set out arrived, and then claimed to have a title under the statute of limitations.

Held, affirming the decision of the Court of Appeal (18 Ont. App. R. 25, *sub nomine* *Wright* v. *Bell*), that as he held under an express trust by the terms of the will the rights of the other devisees could not be barred by the statute.

Houghton v. *Bell* .. .. xxiii., 498

5.—Joint Stock Company—Shares Paid for by Transfer of Property—Adequacy of Consideration—Promoter Selling Property to Company—Fiduciary Relation—Winding-up—Contributory.

There is a distinction between a trust for a company of property acquired by promoters and afterwards sold to the company and the fiduciary relationship engendered by the promoters, between themselves and the company, which exists as soon as the latter is formed.

A promoter who purchases property with the intention of selling it to a company to be formed does not necessarily hold such property in trust for the prospective company, but he stands in a fiduciary relation to the latter and if he sells to them must not violate any of the duties devolving upon him in respect to such relationship.

If he sells, for instance, through the medium of a board of directors, who are not independent of him the contract may be rescinded, provided the property remains in such a position that the parties may be restored to their original status.

There may be cases in which the property itself may be regarded as being bound by a trust either *ab initio* or in consequence of *ex post facto* events; if a promoter purchases property for the company from a vendor who is to be paid by the company when formed, and by a secret arrangement with the vendor a part of the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit which he cannot retain; and if any part of such secret profit consists of paid-up shares of the company issued as part of the purchase price of the property such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares, for which the promoter may be made a contributory.

In re Hess Mfg. Co. Edgar v. *Sloan*, xxii., 644

6.—Power to Borrow Money—Promissory Note — Charge on Estate — Exercise of Power.

The defendant was trustee of the estate of one Simonds, and the action was brought to recover money lent to a former trustee, one Lee. The trust deed to Lee gave him power to borrow money on mortgage. He obtained $2,000 from the plaintiff, which he represented was for the use of the estate, giving him a promissory note signed "G. H. Lee, trustee of E. I. Simonds," and indorsed by G. H. Lee. The Judge in Equity gave judgment for the plaintiff, holding that Lee having power to borrow on mortgage, was acting within his powers in borrowing from plaintiff, but if not he got the money on the promise that he would exercise the power. The Supreme Court of New Brunswick reversed this judgment, holding that there was no evidence of such promise, and the estate never having had the benefit of the money the trustee would not have been entitled to indemnity, and the plaintiff's right was only to be placed in the same position as the trustee. On further appeal the Supreme Court of Canada, after hearing counsel for appellant, affirmed the judgment of the Supreme Court of New Brunswick, and dismissed the appeal without calling upon counsel on the other side.

Connor v. *Vroom*, 20th February, 1895, xxiv., 701

7.—Trustee—Account of Trust Funds—Abandonment by Cestui que Trust—Evidence.

The holder of two insurance policies, one in the Providence Washington Ins. Co., and the other in the Delaware Mutual, on which actions were pending, assigned the same to M. as security for advances and authorized him to proceed with the said actions and collect the moneys paid by the insurance companies therein. By a subsequent assignment J. became entitled to the balance of said insurance moneys after M.'s claim was paid. The actions resulted in the policy of the Providence Washington being paid in full to the solicitor of M., and for a defect in the other policy the plaintiff in the action thereon was non-suited. In 1886 M. wrote to J. informing him that a suit in equity had been instituted against the Delaware Mutual Ins. Co. and its agent, for reformation of the policy and payment of the sum insured and requesting him to give security for costs in said suit, pursuant to a judge's order therefor. J. replied that as he had not been consulted in the matter and considered the success of the suit problematical he would not give security, and forbade M. employing the trust funds in its prosecution. M. wrote again saying "as I understand it, as far as you are concerned you are satisfied to abide by the judgment in the suit at law, and decline any responsibility and abandon any interest in the equity proceedings," to which J. made no reply. The solicitor of M. provided the security and proceeded with the suit, which was eventually compromised by the company paying somewhat less than half the amount of the policy. Before the above letters were written J. had brought suit against M. for an account of the funds received under the assignment, and in 1887, more than a year after they were written, a decree was made in said suit referring it to a referee to take an account of trust funds received by M., or which might have been received with reasonable diligence, and of all claims and charges thereon prior to the assignment to J., and the acceptance thereof, which decree was affirmed by the full court and by the Supreme Court of Canada. On the taking of said account M. contended that all claim on the Delaware policy had been abandoned by the above correspondence, and objected to any evidence relating thereto. The referee took the evidence and charged M. with the amount received, but on exceptions by M. to his report the same was disallowed.

Held, reversing the judgment of the Supreme Court of New Brunswick, that the

sum paid by the Delaware Company was properly allowed by the referee; that the alleged abandonment took place before the making of the decree which it would have affected and should have been so urged; that M. not having taken steps to have it dealt with by the decree could not raise it on the taking of the account; and that, if open to him, the abandonment was not established as the proceedings against the Delaware Company were carried on after it exactly as before, and the money paid by the company must be held to have been received by the solicitor as solicitor of M., and not of the original holder.

Held, further, that the referee, in charging M. with interest on money received from the date of receipt of each sum to a fixed date before the suit began, and allowing him the like interest on each disbursement from date of payment to same fixed date had not proceeded upon a wrong principle.

Jones v. *McKean* .. .. xxvii., 249

8.—Powers of Liquidators to Buy or Sell Property of which they are Administrators—Art. 1484 C. C.

In an action where no special demand has been made to that effect, the court cannot declare the nullity of a deed of transfer alleged to have been made in contravention of the provisions of art. 1484 of the Civil Code of Lower Canada, prohibiting administrators and trustees from purchasing property in their charge as such.

Guertin v. *Sansterre* .. .. .. xxvii., 522

9.—Conveyance of Land in the Name of Third Person—Debtor and Creditor—Fraud—Declaration of Trust—Parties in Pari Delicto.

In 1875 G. M. entered into an agreement for the purchase of a parcel of land in Halifax, and entered into possession and commenced to build a house on one of the lots. In 1877 he was called upon to carry out his agreement, and to pay the purchase money, but being then financially embarrassed, he could not make the payment. The house was not then completed although he was able to occupy it. He applied to a building society for a loan, but, as there were judgments recorded against him, which would have a priority, he caused the deed for the land to be executed in the name of W. M., his nephew, and then procured the loan upon it as security. W. M. afterwards took possession of the property, and an action was brought against him by G. M. to compel him to execute a conveyance, and for an account of rents and profits. The trial judge held, that the deed had been taken in the name of the nephew for the purpose of hindering, delaying and defrauding creditors and refused the relief asked for. The court *en banc* reversed this judgment and ordered W. M. to convey the property to G. M.

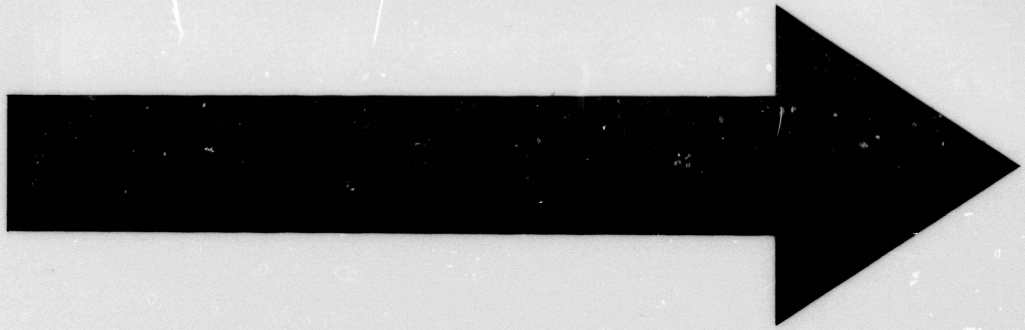
Held, affirming the decision of the Supreme Court of Nova Scotia, that it did not appear from the evidence that G. M., in having the deed made in the name of his nephew, had the intent to defraud his creditors, who were not prejudiced, and had not complained; that the parties were not *in pari delicto*, and G. M. was entitled to relief as the more excusable of the two.

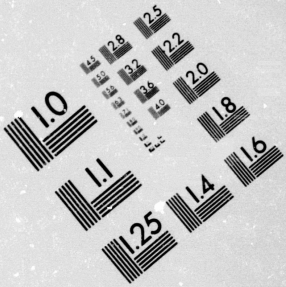
Mackenzie v. *Mackenzie*, 20th February, 1897.

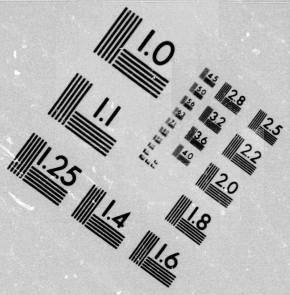
10.—Trustee—Misappropriation—Surety Evidence—Knowledge by Cestui que Trust—Estoppel—Parties.

Funds held by F. as trustee for C., were misappropriated by being deposited with the firm of F. F. & Co., of which F. was a member, and after being so kept on deposit for a period of upwards of six years, were lost in consequence of the failure of the firm. In an action against the defendants, who were sureties for F., to compel them to make good the funds so misappropriated and lost, the defence relied upon the knowledge of the misappropriation on the part of C., which knowledge was sought to be shown by the fact that payments of interest were made to C., from time to time, by cheque of the insolvent firm.

The Supreme Court of Nova Scotia *en banc* held, that the manner in which these payments were made was not evidence of knowledge on the part of C., that she was bound to communicate to the sureties; that at most it showed nothing more than assent by C. to the deposit of the income to which she was entitled with the firm of which her trustee was a member. The court also held, that the trial judge could have disposed of the contention raised on behalf of the defendants without making C. a party to the suit. And it also seemed to the court, that knowledge on the part of C. that some part of the trust fund had been placed by the trustee temporarily with F. F. & Co., awaiting investment on good security, would not be held to be knowledge, assent or acquiescence by C. in the misconduct of the trustee which led to the loss of the funds. (30 N. S. Rep. 173, *sub nomine*, *Eastern Trust Co.* v. *Forrest, et al.*).







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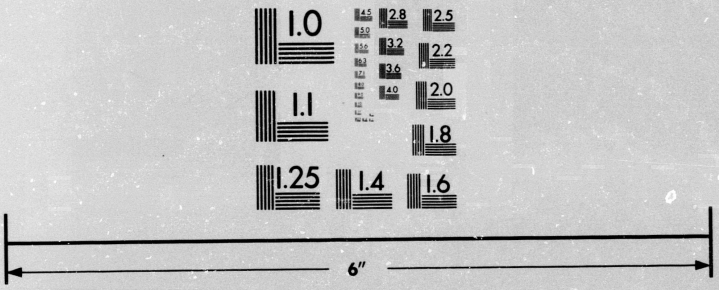

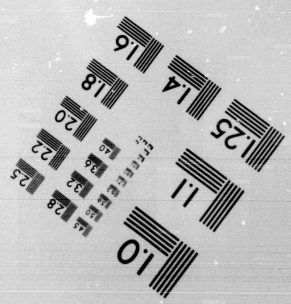

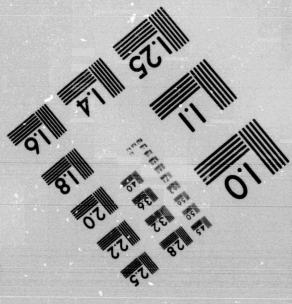

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On appeal, the Supreme Court of Canada affirmed the decision of the Supreme Court of Nova Scotia, *en banc*, and dismissed the appeal with costs.

Bayne et al. v. *The Eastern Trusts Co. et al.*, 9th November, 1897 .. .. .. xxviii., 606

11.—Construction of Statute—20 & 21 Vic. c. 54, s. 12 (Imp.)—Application—Criminal Prosecution—Embezzlement of Trust Funds—Suspension of Civil Remedy—Stifling Prosecution—Partnership.

The Imperial Act, 20 & 21 Vic. c. 54, s. 12, provides that "Nothing in this Act contained, nor any proceeding, conviction or judgment to be had or taken thereon, against any person under this Act, shall prevent, lessen or impeach any remedy at law or in equity, which any party aggrieved by any offence against this Act might have had if this Act had not been passed; * * * and nothing in this Act contained shall affect or prejudice any agreement entered into, or security given by any trustee, having for its object the restoration or re-payment of any trust property misappropriated."

Held, affirming the judgment of the Supreme Court of British Columbia (5 B. C. Rep. 571), that the class of trustees referred to in said Act were those guilty of misappropriation of property held upon express trusts.

Semble, that the section only covered agreements or securities given by the defaulting trustee himself.

Quære.—Is the said Imperial Act in force in British Columbia?

If in force it would not apply to a prosecution for an offence under R. S. C. c. 264 (The Larceny Act) s. 58.

An action was brought on a covenant given for the purpose of stifling a prosecution for the embezzlement of partnership property under R. S. C. c. 264, s. 58, which was not re-enacted by the Criminal Code, 1892.

Held, that the alleged criminal act, having been committed before the Code came into force, was not affected by its provisions, and the covenant was illegal at common law. Further, the partnership property not having been held on an express trust, the civil remedy was not preserved by the Imperial Act.

Major v. *McCraney et al.*, 21st November, 1898 .. .. xxix., 182

12.—For Benefit of Creditors—Power of Attorney to Assignor—Sale of Goods to Assignor—Authority to use Trustee's Name—Evidence.

See Debtor and Creditor, 2.

13.—Purchase of Land by—Mortgage—Indemnity to Vendor—Liability of Purchaser.

See Mortgage, 2.

14.—Fraudulent Appropriation by Trustee—Unlawful Receiving — Simultaneous Acts.

See Criminal Law, 2.

15.—Trust imposed on Crown—Railway Subsidy—Application—Discretion.

See Constitutional Law, 6.

16.—Trust under Will—Liability for Negligence—Care of Estate Property.

See Executors, 1.

17.—Director of Company — Sale to—Fiduciary Relationship—R. S. C. c. 129, s. 34.

See Winding-up Act, 2.

18.—Assignment for Benefit of Creditors—Inspector of Insolvent Estate—Guarantee by Creditor and Inspector on Sale of Assets—Account for Profit.

See Insolvency, 2.

19.—Trustees and Executors—Legacy in Trust — Discretion of Trustee — Vagueness or Uncertainty as to Beneficiaries—Poor Relatives—Public Protestant Charities — Charitable Uses—Persona Designata.

See Will, 8.

20.—Fraudulent Conversion — Debentures Transferable by Delivery—Estoppel—Implied Notice—Past Due Bonds.

See Negotiable Security.
" Pledge, 1.

21.—Mortgage of Trust Estate—Equity Running with Estate—Equitable Recourse — Construction of Deed — Description of Lands — Falsa Demonstratio — Water Lots — Accretion to Lands—After Acquired Title—Contribution to Redeem—Discharge of Mortgage—Parol Evidence to Explain Deed—Estoppel by Deed.

See Mortgage, 4.

22.—Constitutional Law — Province of Canada—Treaties with Indians—Surrender of Indian Lands—Charge upon Lands—B. N. A. Act s. 109—Annuity to Indians — Revenue from Lands—Increase of Annuity.

See Constitutional Law, 13.

23.—Mortgage on Foreign Lands — Action to Set Aside — Jurisdiction — Secret Trust—Lex rei Sitæ.

See Lex rei Sitæ.

24.—Principal and Agent — Advances to Agents to Buy Goods—Trust Goods Mixed with Those of Agent — Replevin—Equitable Title.

See Principal and Agent, 7.

25.—Municipal Corporation — Railway Aid — Debentures — Sale of Shares at Discount — Trustee — Debtor and Creditor—Division of County—Erection of New Municipalities—Assessment—Action en Reddition de Comptes —Arts. 78, 154, 939 Mun. Code Que.—24 Vic. c. 30 (Que.)—29 Vic. c. 59 (Que).

See Municipal Corporation, 39*a*.

TUTOR.

1.—Testamentary Succession—Executors —Balance Due by Tutor—Action for Account — Provisional Possession — Parties to Action — Envoie en Possession.

See Executors, 2.

2.—Nullified Instruments — Evidence — Admissions — Compromise —"Transaction"—Estoppel—C. C. Arts. 311 and 1243-1245.

See Deed, 7.

ULTRA PETITA.

1.—New Matter Set up in Reply—Failure to Demur or Object to Proof—Issues Joined—Estoppel.

See Pleading, 7.

ULTRA VIRES.

Joint Stock Company—Ultra Vires Contract—Consent Judgment on—Action to Set Aside.

See Company, 4.

UPPER CANADA IMPROVEMENT FUND.

See Constitutional Law, 20.

USAGE.

Sale of Goods by Sample—Delivery—Evidence of Trade Custom.

See Contract, 12.

And *See* Custom of Trade.

USER.

1. — Constitutional Law — Navigable Waters—Title to Bed of Stream—Crown—Dedication of Public Lands by — Presumption of Dedication — Obstruction to Navigation—Public Nuisance—Balance of Conveniences.

See Constitutional Law, 15.

2.—Roadway — Construction of Deed—Servitude—Art. 549 C C.

See Deed, 8.

" Easement, 3.

3.—Highway—Old Trails in Rupert's Land—Necessary Way — Substituted Roadway—Dedication—Evidence.

See Crown, 3.

" Highway, 3.

4.—Highway—Old Trails in Rupert's Land—Substituted Roadway—Dedication by the Crown.

See Dedication.

USUFRUCT.

Will—Construction of—Donation — Substitution—Partition, Per Stirpes or Per Capita—Alimentary Allowances —Accretion Between Legatees.

The late Joseph Rochon made his will in 1852, by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance, and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared:—"Il sera de plus l'administrateur de mes dits biens

jusqu'au décès de mes deux sœurs usufruitières, nommées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament."

Held, Gwynne, J., dissenting, that the testamentary dispositions thus made did not create a substitution but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate (subject to the usufruct), to their children, which took effect at the death of the testator.

Held, also, that the charge of preserving the estate—"conserver le fonds"—imposed upon the testamentary executor could not be construed as imposing the same obligation upon the sisters who were excluded from the administration, or as having, by that term, given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly subject to the usufruct.

Held, further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes*.

Robin v. *Duguay* .. .. xxvii., 347

USURY.

BUILDING SOCIETIES—PARTICIPATING BORROWERS—SHAREHOLDERS—C. S. L. C. c. 58—42 & 43 VIC. (Q.) c. 32—LIQUIDATION—EXPIRATION OF CLASSES—ASSESSMENTS ON LOANS—NOTICE OF—INTEREST AND BONUS—USURY LAWS—C. S. C. c. 58—ART. 1785 C. C.—ADMINISTRATORS AND TRUSTEES—SALES TO—PRETE-NOM—ART. 1484 C. C.

See Building Society.

VACATION.

APPEAL—TIME LIMIT—COMMENCEMENT OF—PRONOUNCING OR ENTRY OF JUDGMENT—SECURITY—EXTENSION OF TIME—ORDER OF JUDGE—VACATION—R. S. C. c. 135, ss. 40, 42, 46.

The delay of sixty days for appealing to the Supreme Court of Canada, prescribed by section 40 to the Supreme and Exchequer Courts Act is not suspended during the vacation of the court established by the rules.

The News Printing Co. v. *Macrae et al.*, xxvi., 695

VENDITIONI EXPONAS.

See Appeal, 56.
" Practice, 5.
" Sale, 7.

VENDOR AND PURCHASER.

1.—SALE OF LAND—SALE SUBJECT TO MORTGAGE—INDEMNITY OF VENDOR—SPECIAL AGREEMENT—PURCHASER TRUSTEE FOR THIRD PARTY.

L. F. agreed in writing to sell land to C. F. and others subject to mortgages thereon, C. F. to hold same in trust to pay half the proceeds to L. F. and the other half to himself and associates. When the agreement was made it was understood that a company was to be formed to take the property, and before the transaction was completed such company was incorporated and L. F. became a member, receiving stock as part of the consideration for his transfer. C. F. filed a declaration that he held the property in trust for the company, but gave no formal conveyance. An action having been brought against L. F. to recover interest due on a mortgage against the property, C. F. was brought in as third party to indemnify L. F., his vendor, against a judgment in said action.

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau and King, JJ., dissenting, that the evidence showed that the sale was not to C. F. as a purchaser on his own behalf but for the company, and the company and not C. F. was liable to indemnify the vendor.

Fraser v. *Fairbanks* .. .. .. xxiii., 79

2.—AGREEMENT TO PAY INTEREST—DELAY—DEFAULT OF VENDOR.

Under a contract of purchase of real estate providing that "if from any cause whatever," the purchase money was not paid at a specified time interest should be paid from the date of the contract the vendor is relieved from payment of such interest while the delay in payment is caused by the wilful default of the vendor in performing the obligations imposed upon him.

A contract containing such provision also provided for the payment of the purchase money on delivery of the conveyance to be prepared by the vendor.

A conveyance was tendered which the vendee would not accept, whereupon the vendor brought suit for rescission of the contract which the court refused, on the ground that the conveyance tendered was defective. He then refused to accept the purchase money unless interest from the date of the contract was paid. In an action by the vendee for specific performance:

Held, affirming the decision of the Court of Appeal, that the vendee was not obliged to pay interest from the time the suit for rescission was begun as until it was decided

the vendor was asserting the failure of the contract, and insisting that he had ceased to be bound by it, and after the decision in that suit he was claiming interest to which he was not entitled, and in both cases the vendee was relieved from obligation to tender the purchase money.

By the terms of the contract the vendor was to remain in possession until the purchase money was paid and receive the rents and profits.

Held, that up to the time the vendor became in default the vendee, by his agreement, was precluded from claiming rents and profits and was not entitled to them after that time as he had been relieved from payment of interest and the purchase money had not been paid.

Hayes v. *Elmsley* .. .. xxiii., 623

3.—Contract of Sale—Interest Payable by Purchaser—Delay—Duty to Prepare Conveyance.

A person in possession of land under a contract for purchase by which he agreed to pay the purchase money as soon as the conveyances were ready for delivery and interest thereon from the date of the contract is not relieved from liability for such interest unless the vendor is in wilful default in carrying out his part of the agreement and the purchase money is deposited by the vendee in a bank or other place of deposit in an account separate from his general current account.

The vendor is not in wilful default where delay is caused by the necessity to perfect the title owing to some of the vendors being infants nor by tendering a conveyance to which the vendee took exception but which was altered to his satisfaction while still in the hands of the vendors' agent as an escrow and before it was delivered. Fournier and Taschereau, JJ., dissenting.

A provision that the purchase money is to be paid as soon as the conveyance is ready for delivery does not alter the rule that the conveyance should be prepared by the purchaser. Fournier and Taschereau, JJ., dissenting.

Stevenson v. *Davis* .. .. xxiii., 629

4.—Sale of Land—Sale by Auction—Agreement as to Title—Breach of—Determination of Contract.

W. bought property at auction signing on purchase a memo. by which he agreed to pay 10 per cent. of the price down and the balance on delivery of the deed. The auctioneer's receipt for the 10 per cent. so paid stated that the sale was on the understanding that a good title in fee simple clear of all encumbrances up to the first of the ensuing month was to be given to W., otherwise his deposit to be returned. After the date so specified, W., not having been tendered a deed which he would accept, caused the vendor to be notified that he considered the sale off and demanded repayment of his deposit, in reply to which the vendor wrote that all the auctioneer had been instructed to sell was an equity of redemption in the property; that W. was aware that there was a mortgage on it and had made arrangements to assume it; that a deed of the equity of redemption had been tendered to W.; and he was required to complete his purchase.

In an action against the vendor and auctioneer for recovery of the amount deposited by W.:

Held, reversing the decision of the Supreme Court of Nova Scotia, that the vendor having repudiated the agreement, W., being entitled to a title in fee clear of encumbrance, and not bound to accept the equity of redemption, could at once treat the contract as rescinded and sue to recover his deposit.

Wrayton v. *Naylor* .. .. xxiv., 295

5.—Sale of Timber—Delivery—Time for Payment—Premature Action.

By agreement in writing I. agreed to sell and the V. H. L. Co. to purchase timber to be delivered "free of charge where they now lie within ten days from the time the ice is advised as clear out of the harbour, so that the timber may be counted * * * Settlement to be finally made inside of thirty days in cash less 2 per cent. for the dimension timber which is at John's Island."

Held, affirming the decision of the Court of Appeal, that the last clause did not give the purchaser thirty days after delivery for payment; that it provided for delivery by vendor and payment by purchasers within thirty days from the date of the contract; and that if purchasers accepted the timber after the expiration of thirty days from such date, an event not provided for in the contract, an action for the price could be brought immediately after the acceptance.

Victoria Harbour Lumber Co. v. *Irwin*, xxiv., 607

6.—Agreement for Sale of Land—Objection to Title—Waiver—Lapse of Time—Will—Devise—Defeasible Title—Rescission.

An agreement for the sale and purchase of land contained the provision that the vendor should examine the title at his own expense

and have ten days from the date of the agreement for that purpose, and should be "deemed to have waived all objections to title not raised within that time." Upon the investigation of the title by the purchaser it appeared that the vendors derived title through one P. a purchaser from one B. S., a devisee under a will by which the land in question was devised by the testatrix to her daughter the said B. S. and certain other land to another daughter; the will contained the direction that "if either daughter should die without lawful issue the part and portion of the deceased shall revert to the surviving daughter," and a gift over in case both daughters should die without issue. At the time of the agreement B. S. was alive and had children. An objection was taken to the title but not within the ten days from the date of the agreement. The purchasers brought a suit for specific performance of the contract.

Held, reversing the judgment of the court below, that although B. S. took an estate in fee simple subject to the executory devise over in case she should die without issue living at her death, inasmuch as the purchaser would get a present holding title accompanied by possession, the objection taken did not go to the root of the title and was one to which effect could not be given, not having been taken within the time limited by the agreement.

Armstrong et al. v. *Nason.*
Armstrong et al. v. *Wright.*
Armstrong et al. v. *McClelland* .. xxv., 263

7.—Special Tax—Ex Post Facto Legislation—Warranty.

Assessment rolls were made by the City of Montreal under 27 & 28 Vic. c. 60 and 29 & 30 Vic. c. 56, apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside as null and the other was lost. The corporation obtained power from the Legislature by two special Acts to make new rolls, but in the meantime the property in question had been sold and conveyed by a deed with warranty containing a declaration that all taxes both special and general had been paid. New rolls were subsequently made assessing the lands for the same improvements and the purchaser paid the taxes and brought action against the vendor to recover the amounts so paid.

Held, affirming the judgments in the Courts below, Gwynne, J., dissenting, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the sale were therefore the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had become owner of the lands, and that the warranty and declaration by the vendor did not oblige her to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequent to the sale.

La Banque Ville Marie v. *Morrison*, xxv., 289

8.—Agreement for Sale of Land—Assignment by Vendee—Principal and Surety—Deviation from Terms of Agreement—Giving Time—Creditor Depriving Surety of Rights—Secret Dealings with Principal—Release of Lands—Arrears of Interest—Novation—Discharge of Surety.

An agreement for the purchase and sale of certain specified lots of land in consideration of a price payable partly in cash and partly by deferred instalments on dates therein specified was subject to payments being made in advance of those dates under a proviso that "the company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The vendee assigned all his interest in the agreement to a third party by a written assignment registered in the vendors' office and at the time there were several conversations between the three parties as to the substitution of the assignee as purchaser of the lots in the place of the original vendee. The vendors afterwards accepted from the assignee several payments upon interest and upon account of the principal remaining due from time to time as lots and parts of lots were sold by him, and without the knowledge of the vendee arranged a schedule apportioning the amounts of payments to be made for releases of lots sold based on their supposed values, and in fact released lots and parts of lots so sold and conveyed them to sub-purchasers upon payments according to this schedule and not in the ratio of the full number of lots to the unpaid balance of the price and without payment of all interest owing at the time sales were made. The vendors charged the assignee with and accepted from him compound interest and also allowed the assignee an extension of time for the payment of certain interest overdue and thus dealt with him in respect to the property in a manner different from the provisions of the agreement in reference to the conveyance of lots to sub-purchasers.

Held, that the dealings between the vendors and the assignee did not effect a novation by the substitution of him as debtor in the place

of the original vendee, or release the vendee from liability under the original agreement.

Held also, that though the course of dealing did not change the relation of the parties to that of principal creditor, debtor and surety, that notice to the vendors of the assignment and their knowledge that the vendee held the land as security for the performance of the assignee's obligations towards him, bound the vendors so to deal with the property as not to affect its value injuriously or impede him in having recourse to it as a security.

In a suit taken by the vendors against the vendee to recover interest over due, equitable considerations would seem to be satisfied by treating the company as having got from the third party on every release of a part of a lot the full amount that they ought to have got from him on a release for an entire lot, and as having received on each transfer all arrears of interest.

In the absence of any sure indication in the agreement the ratio of apportionment of payments for the release of lots sold should be established by adopting the simple arithmetical rule of dividing the amount of the deferred instalments stated in the agreement by the total number of lots mentioned therein.

Wilson v. *The Land Security Company*, xxvi., 149

9.—Unpaid Vendor—Conditional Sale—Suspensive Condition — Movables Incorporated with Freehold — Immovables by Destination — Hypothecary Charges—Arts. 375 *et seq.* C. C.

A suspensive condition in an agreement for the sale of movables, whereby, until the whole of the price shall have been paid, the property in the thing sold is reserved to the vendor is a valid condition.

In order to give movable property the character of immovables by destination, it is necessary that the person incorporating the movables with the immovable should be, at the time, owner both of the movables and of the real property with which they are so incorporated. *Lainé* v. *Béland* (26 Can. S. C. R. 419), and *Filiatrault* v. *Goldie* (Q. R. 2 Q. B. 368), distinguished.

Decision of the Court of Queen's Bench affirmed, Girouard, J., dissenting.

La Banque d'Hochelaga v. *The Waterous Engine Works Co.* .. .. xxvii., 406

10.—Principal and Agent—Mistake—Contract—Agreement for Sale of Land — Agent Exceeding Authority — Specific Performance—Findings of Fact.

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

Murray v. *Jenkins* .. .. .. xxviii., 565

11.—Sale of Leased Premises—Termination of Lease—Damages—Art. 1663 C. C.

The Court of Queen's Bench for Lower Canada (Q. R. 7 Q. B. 293), reversed the decision of the trial court, and held; that the purchaser of real estate, to be delivered forthwith, could not require the vendor to eject the tenants, the existence of leases being no impediment to immediate delivery of the premises sold, and every sale being subject to existing leases up to the time of the expiration of the current term, and further, that, if the purchaser refused to carry out the agreement for sale on the ground of the existence of such leases, he could not have the sale set aside (*resciliée*), with damages against the vendor.

On appeal, the Supreme Court of Canada affirmed the judgment appealed from for the reasons stated in the Court of Queen's Bench, Q. R. 7 Q. B. 293, and dismissed the appeal with costs.

Alley v. *The Canada Life Assurance Co.*, 14th June, 1898 .. .. xxviii., 608

11*a*. — Contract — Rescission — Innocent Misrepresentation—Common Error—Sale of Land—Failure of Consideration.

An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation.

But where, by error of both parties and without fraud or deceit, there has been a complete failure of consideration a Court of Equity will rescind the contract and compel the vendor to return the purchase money. Thus where, on the sale of a mining claim, it turned out that the whole property sold

was included in prior claims whereby the purchaser got nothing for his money the contract was rescinded though the vendor acted in good faith and the transaction was free from fraud.

Cole v. *Pope* .. .. xxix., 291

12.—Title to Land—Agreement to Convey Land—Title under Will—Restriction — Part Performance — Special Legislation—Compliance with Terms of.

See Specific Performance, 1.

13.—Contract of Sale—Contre Lettre—.Absolute Sale—Deed for Security—Principal and Agent.

See Contract, 13.

14.—Purchaser of Lease for Lives—Registry Act—Protection.

See Lease, 1.

15.—Property, Real and Personal—Immovables by Destination — Movables Incorporated with Freehold—Severance from Realty—Contract—Resolutory Condition—Conditional Sale—Hypothecary Creditor—Unpaid Vendor—C. C. Arts. 379, 2017, 2083, 2085, 2089.

See Contract, 30.

16.—Deed — Construction of — Title to Lands — Ambiguous Description — Evidence to Vary or Explain Deed—Possession — Conduct of Parties — Presumptions from Occupation of Premises—Arts. 1019, 1238, 1242, 1473, 1599 C. C.—47 Vic. c. 87, s. 3 (D.); 48 & 49 Vic. c. 58, s. 3 (D.)—45 Vic. c. 20 (Q.)

See Deed, 6.

17.—Sale of Leased Premises—Termination of Lease—Art. 1663 C. C.—Damages.

See Lease, 4.

WAIVER.

1.—Title to Land—Objections to Title.

A purchaser who takes possession of the property and exercises acts of ownership by making repairs and improvements, will be held to have waived any objections to the title.

Objections to title cannot be raised where the purchaser has made a tender of a blank deed of mortgage for execution for the purpose of carrying out the purchase.

Wallace et al. v. *Hesslein et al.*, 21st Nov., 1898 .. .. xxix., 171

2.—Life Insurance—Condition in Policy—Payment of Premium by Note—Renewal of Note—Demand of Payment after Dishonour.

See Insurance, Life, 1.

3.—Insurance against Fire—Mutual Insurance Company — Contract — Termination of—Notice—Statutory Conditions — R. S. O. (1887) c. 167 — Estoppel.

See Insurance, Fire, 4.

4. — Debtor and Creditor — Composition and Discharge — Acquiescence in—New Arrangement of Terms of Settlement—Waiver of Time Clause — Principal and Agent — Deed of Discharge — Notice of Withdrawal from Agreement — Fraudulent Preferences.

See Debtor and Creditor, 8.

5.—Fire Insurance—Conditions of Policy — Breach — Recognition of Existing Risk after Breach — Agent's Authority.

See Contract, 31.
" Insurance, Fire, 6.
" Principal and Agent, 8.

WARRANT.

1.—Criminal Code, s. 575—Persona Designata—Officers de Facto and de Jure — "Chief Constable" — Confiscation of Gaming Instruments, Moneys, Etc. —Ministerial Officer.

A warrant issued under s. 575 of the Criminal Code to seize gaming instruments would be good if issued on the report of a person who filled *de facto* the office of "deputy high constable," though he was not such *de jure*.

O'Neil v. *The Attorney-General of Canada*, xxvi., 122

2.—Form in Statute—Canada Temperance Act—Search Warrant—Magistrate's Jurisdiction — Constable — Justification of Ministerial Officer —Judgment Inter Partes.

See Canada Temperance Act, 2.
" Res Judicata, 7.
" Search Warrant, 1.

WARRANTY.

1.— Action in Warranty — Proceedings Taken by Warrantee before Judgment on Principal Demand.

It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdiction arises and he suffers no prejudice thereby.

But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned he does so at his own risk, and if an unfounded action has been taken against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences.

Archbald v. *deLisle.*

Baker v. *deLisle.*

Mowat v. *deLisle* .. .. xxv., 1

2.—Action of—Proceedings en Garantie —Assessment of Damages — Questions of Fact.

The Supreme Court will not interfere with the amount of damages asssessed by a judgment appealed from if there is evidence to support it.

In cases of *delit* or *quasi-delit* a warrantee may before condemnation take proceedings *en garantie*, and the warrantor cannot object to being called into the principal action as a defendant *en garantie*. *Archibald* v. *deLisle* (25 Can. S. C. R. 1), followed.

The Montreal Gas Co. v. *St. Laurent.*

The City of St. Henri v. *St. Laurent*, xxvi., 176

3.— Suretyship — Recourse of Sureties inter se — Ratable Contribution — Action of Warranty — Banking—Discharge of Co-surety—Reserve of Recourse—Trust Funds in Possession of a Surety—Arts. 1156, 1959 C. C.

Where one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay such moneys to the creditor or to the co-surety himself, if the creditor has already been paid by him.

When a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to claims they might have against the surety so released by reason of the exercise of such recourse reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties.

Macdonald v. *Whitfield.*

Whitfield v. *The Merchants Bank of Canada*, xxvii., 94

4. — Title to Lands — Impeachment by Warrantor.

The grantee of the warrantors of a title cannot be permitted to plead technical objection thereto in a suit with the person to whom the warranty was given.

Powell v. *Watters* .. .. xxviii., 133

5.—Sale of Deals—Quality—Breach of Contract — Place of Delivery — Acceptance.

See Contract, 3.

6.—Special Tax—Local Improvements— Ex Post Facto Legislation—Warranty.

See Municipal Corporation, 23.

" Vendor and Purchaser, 7.

And *see* Conditions and Warranties.

WATERCOURSES.

1.—Municipal Corporation—Assessment— Extra Cost of Works—Drainage—R. S. O. (1877) c. 174—46 Vic. c. 18 (Ont.)— By-law—Repairs — Misapplication of Funds—Negligence—Damages —Inter-municipal Works.

Where a sum amply sufficient to complete drainage works as designed and authorized by the by-law for the complete construction of the drain has been paid to the municipality which undertook the works, to be applied towards their construction, and was applied in a manner and for a purpose not authorized by their by-law, such municipality cannot afterwards by another by-law levy or cause to be levied from the contributors of the funds so paid any further sum to replace the amount so misapplied or wasted.

The Township of Sombra v. *The Township of Chatham* .. .. xxviii., 1

2.—Adjoining Proprietors of Land—Different Levels—Injury by Surface Water—Watercourse—Easement.

O. and S. were adjoining proprietors of land in the Village of Frankford, Ont., that of O. being situate on a higher level than the other, In 1875 improvements were made to a drain discharging upon the premises of S., and a culvert was made connecting with it. In 1887, S. erected a building on his land and cut off the wall of the culvert which projected over the line of the street, which resulted in the flow of water through it being stopped and backed up on the land of O., who brought an action against S. for the damage caused thereby.

Held, that S. having a right to cut off the part of the culvert which projected over his land was not liable to O. for the damage so caused, the remedy of the latter, if he had any, being against the municipality for not properly maintaining the drain.

Ostrom v. *Sills et al.* .. .. .. xxviii., 485

And *see* Drainage.

WATER LOTS.

1.—Filling in—"Buildings and Erections"—"Improvements"—"Lessor and Lessee.

See Lessor and Lessee, 2.

2.—Crown Grants—Title to Bed of Navigable Waters—Dedication—User—Obstruction to Navigation—Nuisance.

See Constitutional Law, 15.

" Navigable Waters.

WATER RATES.

City of Toronto—By-law—Discrimination in Rates—Government Buildings.

See Municipal Corporation, 11.

WATERS CANADIAN.

1.—Three-mile Limit—Fishing Within—License—Forfeiture—Burden of Proof—R. S. C. c. 93, s. 3.

See Fisheries, 1.

2.—Canadian Waters—Property in Beds—Public Harbours—Erections in Navigable Waters—Interference with Navigation—Right of Fishing—Power to Grant—Riparian Proprietors—Great Lakes and Navigable Rivers—Operation of Magna Charta—Provincial Legislation—R. S. O. (1887) c. 24, s. 47—55 Vic. (O.) c. 10, ss. 5 to 13, 19 and 21—R. S. Q. Arts. 1375 to 1378.

See Constitutional Law, 17.

3.—Treaty of 1818—Construction of—Fisheries—Three-mile Limit—Construction of Statutes—59 Geo. III., c. 38 (Imp.)—R. S. C. c. 94 and c. 95—"Fishing"—Foreign Fishing Vessels.

See Fisheries, 3.

WATERWORKS.

Municipal Corporation—Waterworks—Extension of Works—Repairs—By-law—Resolution—Agreement in Writing—Injunction—Highways and Streets—R. S. Q. Art. 4485—Art. 1033*a* C. C. P.

See Municipal Corporation, 31.

WILL.

1.—Construction of—Division of Estate—Right to Postpone.

T. F. F. who, in partnership with his brother J. F., carried on business as manufacturers of boots and shoes in Montreal, by his last will left all his property and estate to be equally divided between his two brothers, M. W. F., the appellant, and J. F., the respondent. The will contained also the following provision:—But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself, in co-partnership under the name and firm of Fogarty & Brother, should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm, for a period of five years, computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between them and the said Michael William Fogarty, and in the event of the death of either of them, then the whole to go to the survivor. T. F. F. died on the 29th April, 1889. On the 30th April, 1889, a statement of the affairs of the firm was made up by the bookkeeper, and J. W. and M. W. F., having agreed upon such statement, the balance shown was equally divided between the parties, viz., $24,146.34 being carried to the credit of M. W. F., in trust, and $24,146.34 being carried to J. F.'s general account in the books of the firm. At the foot of the

statement a memo. dated 12th June, 1889, was signed by both parties, declaring that the said amount had that day been distributed to them. On the 6th March, 1890, M. W. F. brought an action against J. F., claiming that he was entitled to $24,146.34, with interest, from the date of the division and distribution, viz., 30th April, 1889. J. F. pleaded that under the will he was entitled to postpone payment until five years from the testator's death, and that the action was premature.

Held, affirming the judgment of the court below, that J. F. was entitled under the will to five years to make the division contemplated, and that he had not renounced such right by signing the statement showing the amount due on the 30th April, 1889.

Fogarty v. *Fogarty* .. .. xxii., 103

2.—Testamentary Capacity—Art. 831 C. C.—Weakness of Mind—Undue Influence.

In 1889 an action was brought by G. H. H., in capacity of curator to Mrs. B., an interdict, against A., in order to have a certain deed of transfer made to him by Mrs. B., his mother, set aside and cancelled. Mrs. B. having died before the case was brought on to trial, the respondent, M. B., presented a petition for continuance of the suit on her behalf as one of the legatees of her mother under a will dated the 17th November, 1869. This petition was contested by A. B., who based his contestation on a will dated the 17th January, 1885 (the same date as that of the transfer attacked by the original action), whereby the late Mrs. B. bequeathed the residue of all of her property, etc., to her two sons.

Upon the merits of the contestation as to the validity of the will of the 17th January, 1885:

Held, affirming the judgment of the court below, that art. 831, C. C., which enacts that the testator must be of sound mind, does not declare null only the will of an insane person, but also the will of all those whose weakness of mind does not allow them to comprehend the effect and consequences of the act which they perform.

Held, further, that upon the facts and evidence in the case, the will of the 17th January, 1885, was obtained by A. at a time when Mrs. B. was suffering from a senile *dementia* and weakness of mind, and was under the undue influence of A. B., and should be set aside.

Baptist v. *Baptist* .. .. xxiii., 37

3.—Revocation — Revival — Codicil — Intention to Revive — Reference to Date—Removal of Executor—Statute of Mortmain—Will Executed under Mistake—Ontario Wills Act, R. S. O. (1887) c. 109—9 Geo. II., c. 36 (Imp.).

A will which has been revoked cannot, since the passing of the Ontario Wills Act (R. S. O. [1887] c. 109), be revived by a codicil unless the intention to revive it appears on the face of the codicil either by express words referring to the will as revoked and importing such intention, or by a disposition of the testator's property inconsistent with any other intention, or by other expressions conveying to the mind of the court, with reasonable certainty, the existence of the intention in question.

A reference in the codicil to a date of the revoked will, and the removal of an executor named therein and substitution of another in his place, will not revive it.

Held, per King, J., dissenting, that a codicil referring to the revoked will by date and removing an executor named therein is sufficient indication of an intention to revive such will, more especially when the several instruments are executed under circumstances showing such intention.

Held, per Gwynne and Sedgewick, JJ., that the Imperial Statute, 9 Geo. 2, c. 36 (the Mortmain Act), is in force in the Province of Ontario, the courts of that province having so held (*Doe d. Anderson* v. *Todd*, 2 U. C. Q. B. 82; *Corporation of Whitby* v. *Liscombe*, 23 Gr. 1), and the legislature having recognized it as in force by excluding its operation from acts authorizing corporations to hold lands.

Held, per Gwynne, J., that a will is not invalid because it was executed in pursuance of a solicitor's opinion on a matter of law which proved to be unsound.

Macdonell v. *Purcell*.

Cleary v. *Purcell* .. .. xxiii., 101

4.—Construction — Devise to Children and Their Issue—Per Stirpes or Per Capita — Statute of Limitations — Possession.

Under the following provision of a will "When my beloved wife shall have departed this life and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money * * * and to divide the same equally among those of my said sons and daughters who may then be living, and the children of those of my said sons and daughters who may have departed this life previous thereto:"

Held, reversing the judgment of the Court of Appeal, Ritchie, C.J., dissenting, that the distribution of the estate should be *per capita* and not *per stirpes*.

A son of the testator and one of the executors and trustees named in the will was a minor when his father died, and after coming of age he never applied for probate though he knew of the will, and did not disclaim. With the consent of the acting trustee he went into possession of a farm belonging to the estate, and remained in possession over twenty years, and until the period of distribution under the clause set out arrived, and then claimed to have a title under the statute of limitations.

Held, affirming the decision of the Court of Appeal, that as he held under an express trust by the terms of the will the rights of the other devisees could not be barred by the statute.

Houghton v. *Bell* .. .. xxiii., 498

(Reported *sub nomine Wright* v. *Bell*, 18 Ont. App. R. 25.)

5.—Devise of Life Estate—Remainder to Issue in Fee Simple—Intention of Testator—Rule in Shelley's Case.

A testator by the third clause of his will devised land as follows: "To my son J., for the term of his natural life, and from and after his decease to the lawful issue of my said son J., to hold in fee simple." In default of such issue the land was to go to a daughter for life with a like remainder in favour of issue, failing which to brothers and sisters and their heirs. Another clause of the will was as follows: "It is my intention that upon the decease of either of my children without issue, if any other child be then dead the issue of such latter child (if any), shall at once take the fee simple of the devise mentioned in the second and third clauses of this my will."

Held, affirming the decision of the Court of Appeal, that if the limitation in the third clause, instead of being to the issue to hold in fee simple had been to the heirs general of the issue, the son, J., under the rule in Shelley's case, would have taken an estate tail: that the word "issue" though *primâ facie* a word of limitation equivalent to "heirs of the body," is a more flexible expression than the latter and more easily diverted by a context or superadded limitations from its *primâ facie* meaning; that it will be interpreted to mean "children" when such limitations or context requires it: that "to hold in fee simple" is an expression of known legal import admitting of no secondary or alternative meaning, and must prevail over the word "issue," which is one of fluctuating meaning; and that effect must be given to the manifest intention of the testator that the issue should take a fee.

King v. *Evans* .. .. xxiv., 356

6.—Devise—Death of Testator Caused by Devisee—Felonious Act. .

No devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself, and in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter. Taschereau,. J., dissenting.

Lundy v. *Lundy* .. .. xxiv., 650

7.—Vendor and Purchaser—Sale of Lands—Waiver of Objections—Lapse of Time—Will, Construction of—Executory Devise over—Defeasible Title—Rescission of Contract.

An agreement for the sale and purchase of land contained the provision that the vendee should examine the title at his own expense and have ten days from the date of the agreement for that purpose, and should be "deemed to have waived all objections to title not raised within that time." Upon the investigation of the title by the purchaser it appeared that the vendors derived title through one P., a purchaser from one B. S., a devisee under a will by which the land in question was devised by the testatrix to her daughter, the said B. S., and certain other land to another daughter: the will contained the direction that "if either daughter should die without lawful issue the part and portion of the deceased shall revert to the surviving daughter," and a gift over in case both daughters should die without issue. At the time of the agreement B. S. was alive and had children. An objection was taken to the title, but not within the ten days from the date of the agreement.

The purchasers brought a suit for specific performance, or rescission of the contract.

Held, reversing the judgment of the court below (21 Ont. App. R. 183), that although B. S. took an estate in fee simple subject to the executory devise over in case she should die without issue living at her death, inasmuch as the purchaser would get a present holding title accompanied by possession, the objection taken did not go to the root of the title and was

one to which effect could not be given, not having been taken within the time limited by the agreement.

Armstrong v. *Nason.*

Armstrong v. *Wright.*

Armstrong v. *McClelland* .. .. xxv., 263

8.—Will, Form of — Holograph Will Executed Abroad — Quebec Civil Code, Art. 7—Locus Regit Actum—Lex Domicilii—Lex rei Sitæ—Trustees and Executors—Legacy in Trust—Discretion of Trustee—Vagueness or Uncertainty as to Beneficiaries—Poor Relatives—Public Protestant Charities — Charitable Uses — Right of Intervention—Persona Designata.

In 1865 J. G. R., a merchant, then and at the time of his death domiciled in the City of Quebec, while temporarily in the City of New York made the following will in accordance with the law relating to holograph wills in Lower Canada: "I hereby will and bequeath all my property, assets or means of any kind, to my brother Frank, who will use one-half of them for Public Protestant Charities in Quebec and Carluke, say the Protestant Hospital Home, French Canadian Mission, and amongst poor relatives as he may judge best, the other half to himself and for his own use, excepting £2,000, which he will send to Miss Mary Frame, Overton Farm." A. R. and others, heirs-at-law of the testator, brought action to have the will declared invalid.

Held, Taschereau, J., dissenting, that the will was valid.

Held, further, Fournier and Taschereau, JJ., dissenting, that the rule *locus regit actum* was not in the Province of Quebec, before the code, nor since under the code itself (art. 7), imperative, but permissive only.

Held, also, Taschereau, J., dissenting, that the will was valid even if the rule *locus regit actum* did apply, because it sufficiently appeared from the evidence that by the law of the State of New York the will would be considered good as to movables wherever situated, having been executed according to the law of the testator's domicile, and good as to immovables in the Province of Quebec, having been executed according to the law of the situation of those immovables.

In this action interventions were filed by Morrin College, an institution where youth are instructed in the higher branches of learning, and especially young men intended for the ministry of the Presbyterian Church in Canada, who are entitled to receive a free, general and theological education, and are assisted by scholarships and bursaries to complete their education; by the Finlay Asylum, a corporate institute for the relief of the aged and infirm, belonging to the communion of the Church of England; and by W. R., a first cousin of the testator, claiming as a poor relative.

Held, that Morrin College did not come within the description of a charitable institution according to the ordinary meaning of the words, and had therefore no *locus standi* to intervene; Sedgewick, J., dissenting; but that Finlay Asylum came within the terms of the will as one of the charities which F. R. might select as a beneficiary, and this gave it a right to intervene to support the will.

Held, further, that in the gift to "poor relatives" the word "poor" was too vague and uncertain to have any meaning attached to it, and must therefore be rejected, and the word "relatives" should be construed as excluding all except those whom the law, in the case of an intestacy, recognized as the proper class among whom to divide the property of a deceased person, and W. R. R. not coming within that class his intervention should be dismissed.

Held, per Fournier and Taschereau, JJ., that the bequest to "poor relatives" was absolutely null for uncertainty.

Ross v. *Ross* .. .. xxv., 307

9. — Legacy — Bequest of Partnership Business— Acceptance by Legatee—Right of Legatee to an Account.

J. and his brother carried on business in partnership for over thirty years, and the brother having died, his will contained the following bequest: "I will and bequeath unto my brother J., all my interest in the business of J. & Co., in the said City of St. Catharines, together will all sums of money advanced by me to the said business at any time, for his own use absolutely forever, and I advise my said brother to wind up the said business with as little delay as possible."

Held, affirming the decision of the Court of Appeal, that J. on accepting the legacy was under no obligation to indemnify the testator's estate against liability for the debts of the firm in case the assets should be insufficient for the purpose and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency.

Robertson v. *Junkin* .. .. .. xxvi., 192

10.—Construction of—Executory Devise over—Contingencies—"Dying without Issue"—"Revert"—Dower—Annuity—Election by Widow—Devolution of Estates Act, 49 Vic. (O.) c. 22—Conditions in Restraint of Marriage—Practice—Added Parties—Orders 46 & 48 Ontario Judicature Act—R. S. O. (1888) c. 109, s. 30.

A testator divided his real estate among his three sons, the portion of A. C. the eldest son being charged with the payment of $1,000 to each of his brothers and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." A. C. died after the testator, leaving a widow, but no issue.

Held, reversing the judgment of the Court of Appeal, that the gift over in the last mentioned clause was intended by the testator to take effect on the death of the devisee without issue at any time and not during the lifetime of the testator only; that it was no ground for departing from this *primâ facie* meaning of the terms of the gift that very burdensome conditions were imposed upon the devisee; and that no such conditions would be imposed on the devise to A. C. by this construction, as the two sums of $1,000 each charged in favour of his brothers were charged upon the whole fee, and if paid by him his personal representatives on his death could enforce repayment to his estate.

Held, also, that the widow of A. C. was entitled to the dower out of the lands devised to him, notwithstanding the defeasible character of his estate; that she was also entitled to the annuity of $50 per annum given her by the will, it not being inconsistent with her right to dower, and she was therefore not put to her election; that the limitation of the annuity to widowhood was not invalid as being in undue restraint of marriage; and that she could not claim a distributive share of the devised lands under the Devolution of Estates Act, which applies only to the descent of inheritable lands.

The mortgagee of the reversionary interest of one of his brothers, in the lands devised to A. C., was improperly added, in the Master's office, as a party to an administration action and could take objection at any time to the proceeding either by way of appeal from the report or on further directions; she was not limited to the time mentioned in Order 48 of the Supreme Court of Judicature, which refers only to a motion to discharge or vary the decree.

Cowan et al. v. *Allen et al.* .. .. xxvi., 292

11.—Devise to Two Sons—Devise over of One's Share—Condition—Context—Codicil.

A testator devised property "equally" to his two sons J. S. and T. G., with a provision that "in the event of the death of my said son T. G., unmarried or without leaving issue," his interest should go to J. S. By a codicil a third son was given an equal interest with his brothers in the property on a condition which was not complied with and the devise to him became of no effect.

Held, reversing the decision of the Supreme Court of Nova Scotia, that the codicil did not affect the construction to be put on the devise in the will; that J. S. and T. G. took as tenants in common in equal moieties, the estate of J. S. being absolute, and that of T. G. subject to an executory devise over in case of death at any time and not merely during the lifetime of the testator. *Cowan* v. *Allen* (26 Can. S. C. R. 292), followed.

Held, also, that the word "equal" indicated the respective shares which the two devisees were to take in the area of the property devised and not the character of the estates given in those shares.

Fraser v. *Fraser* .. .. xxvi., 316

12.—Will, Construction of—Death Without Issue—Executory Devise over—Conditional Fee—Life Estate—Estate Tail.

A testator died in 1856 having previously made his last will, divided into numbered paragraphs, by which he devised his property amongst certain of his children. By the third clause he devised lands to his son F. on attaining the age of 21 years—"giving the executors power to lift the rent, and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of 21 years," and by a subsequent clause he provided that "at the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors." F. attained the age of 21 years and died in 1893, unmarried and without issue.

Held, that neither the form nor the language used in the will would authorize a departure from the general rule as to construction according to the ordinary grammatical meaning of the words used by the

testator, and that, as there would be no absurdity, repugnance or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to the property devised to the testator's sons and daughters by all the preceding clauses of the will.

Held, further, that the gift over should be construed as having reference to failure of issue at the death of the first devisee who thus took an estate in fee subject to the executory devise over.

Crawford et al. v. *Broddy et al.* .. xxvi., 345

13.—Will—Execution of — Testamentary Capacity.

A testator was suffering from a disease which had the effect of inducing drowsiness or stupor during the time he gave the instructions for drafting, and when he executed his will, but as the evidence showed that he thoroughly understood and appreciated the instructions he was giving to the draftsman as to the form his will should take and the instrument itself when subsequently read over to him, it was held to be a valid will.

McLaughlin v. *McLellan et al.* .. xxvi., 646

14.—Undue Influence—Evidence.

In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator it is not sufficient to show that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shown that they are inconsistent with a contrary hypothesis.

Adams v. *McBeath* .. .. .. xxvii., 13

15.—Construction of—Donation — Substitution—Partition, Per Stirpes or Per Capita — Usufruct — Alimentary Allowance—Accretion Between Legatees.

The late Joseph Rochon made his will in 1852 by which he devised to his two sisters the usufruct of all his estate and the property therein to their children, naming Pierre Dupras, his uncle, as his testamentary executor, and directing that his estate should be realized and the proceeds invested according to the executor's judgment, adding to these directions the words "enfin placer la masse liquide de ma succession à intérêt ou autrement, de la manière qu'il croira le plus avantageaux, pour en fournir les revenus à mes dites sœurs et conserver le fonds pour leurs enfants," and providing that these legacies should be considered as an alimentary allowance and should be non-transferable and exempt from seizure. By a codicil in 1890 he appointed a nephew as his testamentary executor in the place of the uncle, who had died, and declared:—"Il sera de plus l'administrateur de mes dits biens jusqu'au décès de mes deux sœurs usufruitères, nominées dans mon dit testament, et jusqu'au partage définitif de mes biens entre mes héritiers propriétaires, et il aura les pouvoirs qu'avait le dit Pierre Dupras dans mon dit testament."

Held, Gwynne, J., dissenting, that the testamentary dispositions thus made did not create a substitution, but constituted merely a devise of the usufruct by the testator to his two sisters and of the estate (subject to the usufruct), to their children, which took effect at the death of the testator.

Held also, that the charge of preserving the estate "conserver le fonds"—imposed upon the testamentary executor could not be construed as imposing the same obligation upon the sisters who were excluded from the administration, or as having, by that term, given them the property subject to the charge that they should hand it over to the children at their decease, or as being a modification of the preceding clause of the will by which the property was devised to the children directly, subject to the usufruct.

Held, further, that the property thus devised was subject to partition between the children *per capita* and not *per stirpes*.

Robin v. *Duguay* .. .. xxvii., 347

16.—Will — Sheriff's Deed — Evidence — Proof of Heirship — Rejection of Evidence — New Trial — Champerty—Maintenance.

A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad. The courts below held that the will was valid.

Held, affirming such decisions, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established and the court would not presume that his father had died before him; and that as the persons claiming under the will had no information

as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust, and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed and the appeal should be dismissed.

May v. *Logie* .. .. xxvii., 443

17.—STATUTE—CONSTRUCTION OF — ESTATES TAIL, ACTS ABOLISHING—R. S. N. S. (1 SER.) C. 112—R. S. N. S. (2 SER.) C. 112—R. S. N. S. (3 SER.) C. 111—28 VIC. C. 2 (N. S.)—EXECUTORY DEVISE OVER—DYING WITHOUT ISSUE — "LAWFUL HEIRS" — "HEIRS OF THE BODY" — ESTATE IN REMAINDER EXPECTANT—STATUTORY TITLE—R. S. N. S. (2 SER.) C. 114, SS. 23 & 24—TITLE BY WILL—CONVEYANCE BY TENANT IN TAIL.

The Revised Statutes of Nova Scotia, 1851(1 ser.) c. 112, provided as follows: "All estates tail are abolished, and every estate which would hitherto have been adjudged a fee tail shall hereafter be adjudged a fee simple; and, if no valid remainder be limited thereon, shall be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." In the revision of 1858 (R. S. N. S. 2 ser. c. 112), the terms are identical. In 1864 (R. S. N. S. 3 ser. c. 111) the provision was changed to the following: "All estates tail on which no valid remainder is limited are abolished, and every such estate shall hereafter be adjudged to be a fee simple absolute, and may be conveyed or devised by the tenant in tail, or otherwise shall descend to his heirs as a fee simple." This latter statute was repealed in 1865 (28 Vic. c. 2) when it was provided as follows: "All estates tail are abolished and every estate which tail shall hereafter be adjudged a fee hitherto would have been adjudged a fee simple and may be conveyed or devised or descend as such." Z., who died in 1859, by his will, made in 1857, devised lands in Nova Scotia to his son, and in default of lawful heirs, with a devise over to other relatives, in the course of descent from the first donee. On the death of Z., the son took possession of the property as devisee under the will, and held it until 1891, when he sold the lands in question in this suit to the appellant.

Held, per Taschereau, Sedgewick and King, JJ., that notwithstanding the reference to "valid remainder" in the statute of 1851 all estates tail were thereby abolished, and further, that subsequent to that statute there could be no valid remainder expectant on an estate, as there could not be a valid estate tail to support such remainder.

Held further, per Taschereau, Sedgewick and King, JJ., that in the devise over to persons in the course of descent from the first devisee, in default of lawful issue, the words "lawful heirs," in the limitation over, are to be read as if they were "heirs of his body"; and that the estate of the first devisee was thus restricted to an estate tail and was consequently, by the operation of the statute of 1851, converted into an estate in fee simple and could be conveyed by the first devisee.

Held, per Gwynne and Girouard, JJ., that estates tail having a remainder limited thereon where not abolished by the statutes of 1851 or 1864, but continued to exist until all estates tail were abolished by the statute of 1865; that the first devisee, in the case in question, took an estate tail in the lands devised and having held them as devisee in tail up to the time of the passing of the Act of 1865, the estate in his possession was then, by the operation of that statute, converted into an estate in fee simple which could be lawfully conveyed by him.

Ernst v. *Zwicker* .. .. xxvii., 594

18.—CONSTRUCTION OF—WORDS OF FUTURITY LIFE ESTATE—JOINT LIVES—TIME FOR ASCERTAINMENT OF CLASS — SURVIVOR DYING WITHOUT ISSUE — "LAWFUL HEIRS."

A devise of real estate to the testator's wife and only child for their joint lives, with estate for life to the survivor and remainder in fee to his lawful heirs, is not evidence of intention upon the part of the testator to exclude the child from the class entitled to the fee, in case such child should survive the testator.

Thompson v. *Smith* .. .. .. xxvii., 628

19.—CONSTRUCTION OF WILL—"OWN RIGHT HEIRS" — LIMITED TESTAMENTARY POWER OF DEVISEE — CONDITIONAL LIMITATIONS—VESTING OF ESTATE.

Under a devise to the testator's "own right heirs" the beneficiaries would be those who would have taken in the case of an intestacy unless a contrary intention appears, and where there was a devise to the only

daughter of the testator conditionally upon events which did not occur, and, under the circumstances, could never happen, the fact of such a devise was not evidence of such contrary intention and the daughter inherited as the right heir of the testator.

In re Ferguson. Turner v. *Bennet*; *Turner* v. *Carson* .. .. xxviii., 38

20.—Executors and Trustees Under — Breach of Trust by One — Dealing with Assets as Executor or Trustee —Presumption — Breach of Trust — Notice—Inquiry.

See Trusts, 1.

21.—Capacity to Make—Evidence Onus— Action to Annul — Parties — Mis en Cause.

See Practice, 30.

22.—Testamentary Succession — Balance Due by Tutor—Executors — Account, Action for — Action for Provisional Possession—Parties to Action.

See Executors, 2.

23.—Evidence — Nullified Instruments — Judicial Admission—Forged Will.

See Admissions.

" Evidence, 26.

WINDING-UP ACT.

1.—Contributory — Shares Paid for by Transfer of Property — Adequacy of Consideration — Promoter Selling Property to Company — Trust —Fiduciary Relation.

Shares in a joint stock company may be paid for in money or money's worth and if paid for by a transfer of property they must be treated as fully paid up; in proceedings under the Winding-up Act the Master has no authority to inquire into the adequacy of the consideration with a view to placing the holder on the list of contributories.

If a promoter purchases property for the company from a vendor who is to be paid by the company when formed, and by a secret arrangement with the vendor a part of the price, when the agreement is carried out, comes into the hands of the promoter, that is a secret profit which he cannot retain; and if any part of such secret profit consists of paid-up shares of the company issued as part of the purchase price of property, such shares may, in winding-up proceedings, be treated, if held by the promoter, as unpaid shares for which the promotor may be made a contributory.

In re Hess Mfg. Co.; *Edgar* v. *Sloan*, xxiii., 644

2.—Sale by Liquidator — Purchase by Director of Insolvent Company — Fiduciary Relationship—R. S. C. c. 129, s. 34.

Upon the appointment of a liquidator for a company being wound up under R. S. C. c. 129 (The Winding-up Act), if the powers of the directors are not continued as provided by s. 34 of the Act their fiduciary relations to the company or its shareholders are at an end and a sale to them by the liquidator of the company is valid.

Chatham National Bank v. *McKeen*, xxiv., 348

3.— Moneys Paid Out of Court — Order Made by Inadvertence—Jurisdiction to Compel Repayment—R. S. C. c. 129, ss. 40, 41, 94 — Locus Standi of Receiver-General—55 & 56 Vic. c. 28, s. 2—Construction of Statute.

The liquidators of an insolvent bank passed their final accounts and paid a balance, remaining in their hands, into court. It appeared that by orders issued either through error or by inadvertence the balance so deposited had been paid out to a person who was not entitled to receive the money, and the Receiver-General for Canada, as trustee of the residue, intervened and applied for an order to have the money repaid in order to be disposed of under the provisions of the Winding-up Act.

Held, affirming the decision of the Court of Appeal for Ontario, that the Receiver-General was entitled so to intervene although the three years from the date of the deposit mentioned in the Winding-up Act had not expired.

Held, also, that even if he was not so entitled to intervene, the provincial courts had jurisdiction to compel repayment into court of the moneys improperly paid out.

Hogaboom v. *The Receiver-General of Canada. In re The Central Bank of Canada*, xxviii., 192

4.—Appeal in Winding-up Proceedings—Amount in Controversy—Joint or Separate Liability — Jurisdiction — Contributories.

See Appeal, 31.

5.—Stock Subscriptions — Surrender — Forfeiture — Duty of Directors — Cancellation of Shares — Contributories — Irregular Organization — Ultra Vires—"The Companies Act."

See Company, 8.
" Pleading, 9.
" Statute, 44.

6.—Building Society in Liquidation—Administrators and Trustees—Sales to — Nullity of Transfer — Art. 1484 C. C.—Practice.

See Building Society.

WITNESS.

1. — Agreement to Charge Lands — Statute of Frauds—Registry.

See Mortgage, 5.
" Notice, 1.
" Registry Laws, 2.

WORDS AND TERMS.

See Terms, Interpretation of.

WRIT.

1.—Of Venditioni Exponas—Sale of Property Under—Order of Court or Judge for.

See Practice, 5.

APPENDIX "A."

Cases decided on appeal to the Supreme Court of Canada during the years 1893-1898, which have not been reported or referred to in the foregoing digest.

A.

Adams v. Townshend.
Appeal allowed with costs, but without prejudice to the plaintiff's right to raise the same questions in an action instituted for the purpose of taking partnership accounts. Taschereau, J., dissented, being of opinion that the appeal should be dismissed with costs. 31st May, 1894.

B.

Bank of Montreal v. Demers.
Motion to quash on ground that circumstances on which special leave was granted were not shewn in the order granting special leave to appeal, dismissed with costs. Motion to stay proceedings pending appeal to Privy Council granted with costs (*Eddy* v. *Eddy*, p. 23, *ante*, followed). 7th March, 1899, vol. xxix.

Brierly v. The Toronto, Huron & Bruce Railway Co.
On motion for the dismissal of a motion for leave to appeal from the Court of Appeal for Ontario, no counsel appeared to support the motion on the day for which notice thereof had been given. The motion was dismissed with costs. 13th May, 1898..

Bulmer v. Town of Westmount.
Appeal dismissed without costs. 14th June, 1898.

Byron v. Tremaine.
Appeal dismissed with costs. 14th December, 1898, xxix.

C.

Canadian Pacific Railway Co. v. Conmee.
On motion on behalf of the appellant and by consent of the respondent, judgment was entered varying the decision of the court appealed from in the terms of consent minutes filed. 22nd March, 1893.

G.

Guest v. Diack.
Appeal dismissed with costs. 14th June, 1898.

I.

Indian Claims, *In re*; Ontario v. Dominion of Canada and Province of Quebec.
Appeal by the Province of Quebec as to payment of contingent annuities to Indians awarded by the Arbitrators, under former decision (pp. 53 and 290, *ante*), dismissed. 7th October, 1898.

Insurance Co. of North America v. McLeod.
Appeal allowed with costs in Supreme Court of Canada, and in the Supreme Court of Nova Scotia; new trial granted on payment of the costs of the former trial by the appellant, within thirty days, otherwise appeal to stand dismissed with costs. 21st November, 1898, xxix.

M.

Maguire v. Hart.
Appeal from Supreme Court of Nova Scotia (29 N. S. Rep. 181), dismissed with costs. xxviii., 272. 7th June, 1897.

Marcotte v. La Banque Nationale.
Appeal dismissed with costs. 15th May, 1898.

Montreal Gas Co. v. Gaffney.
Appeal dismissed with costs. 5th October, 1898.

Murray v. Jones.
Appeal dismissed with costs by consent of parties upon settlement effected during hearing. 2nd April, 1895.

N.

National Fire Insurance Co. v. Bernard.
Appeal dismissed with costs for reasons given in court appealed from. 6th May, 1898.

Nova Scotia Marine Insurance Co. v. Eisenhauser *et al.*
On 4th May, 1893, an appeal was dismissed in this case on the ground that it was premature, and that no appeal could lie until after a new trial which had been ordered. The case came up subsequently on appeal from a final judgment and the decision is noted at p. 144, *ante*.

P.

Page v. The Attorney-General of Ontario.
By consent of parties an order was made modifying the judgment appealed from. 28th October, 1896.

Peterborough, Town of v. Mason.
Appeal dismissed with costs. 5th March, 1896.

Q.

Queen, The, v. O'Neill & Campbell.
Appeal allowed in part without costs, the judgment of the Exchequer Court of Canada being reduced from $37,827.37 to $36,954.83, and the cross-appeal being dismissed with costs. 15th June, 1897.

Queen, The, v. Roche.
Appeal allowed in part, the judgment of the Exchequer Court of Canada being reduced by a number of items amounting together to $22,028.20. 8th May, 1895.

R.

Raphael v. Maclaren.
On 26th February, 1898, after hearing counsel for both parties the court advised an amicable settlement between the parties, which failed, and on 6th May, 1898, judgment on the merits was delivered, allowing the appeal in part; declaring that interest should run upon the amount of $1,555.93 from the date of action, and that all costs of both parties in all the courts should be paid by the respondents out of the trust fund in their hands.

Reid v. McCurry.
Appeal dismissed with costs. 6th May, 1898.

S.

Sheets v. Tait.
Appeal dismissed with costs. 13th October, 1896.

T.

Taylor v. Foy.
Appeal dismissed with costs. 4th March, 1896.

Troop v. Everett.
Appeal dismissed with costs. 9th October, 1894.

W.

Wallace v. Wiswell.
Appeal dismissed with costs, no one appearing when the case was called for hearing. 7th Nov., 1894.

Warminton v. Town of Westmount.
Appeal dismissed without costs. 14th June, 1898.

Williams v. Bartling.
Appeal allowed and new trial ordered with costs. 6th November, 1894.

Y.

York, County of, v. Chapman.
Appeal dismissed with costs, Gwynne, J., dissenting. 24th June, 1893.

APPENDIX "B."

List of Cases carried to the Judicial Committee of Her Majesty's Privy Council on appeal from the Supreme Court of Canada, between 1st July, 1893, and 24th February, 1899.

A.

Adamson v. Rogers (26 Can. S. C. R. 159), leave refused.

Allan v. City of Montreal (23 Can. S. C. R. 390), leave refused.

Attorney-General of Canada v. The Provinces of Ontario, Quebec and Nova Scotia (26 Can. S. C. R. 444), varied (1898) A. C. 700.

Attorney-General of Canada v. City of Toronto (23 Can. S. C. R. 514), leave refused, Canadian Gazette, vol. 21, p. 414.

B.

Boulton v. Shea (22 Can. S. C. R. 742), leave refused, Canadian Gazette, vol. 23, p. 298.

Brophy v. Attorney-General of Manitoba (22 Can. S. C. R. 577), varied (1895) A. C. 202.

C.

Cadieux v. Montreal Gas Co. (28 Can. S. C. R. 382), affirmed (1898) A. C. 718.

Canada Sugar Refining Co. v. The Queen (27 Can. S. C. R. 395), affirmed (1898) A. C. 735.

Canadian Pacific Railway Co. v. Township of Chatham (25 Can. S. C. R. 608), leave refused.

Charlebois v. Delap (26 Can. S. C. R. 221), reversed as to consent judgment, Can. Gazette, vol. 31, p. 11.

Cooper v. The Molsons Bank (26 Can. S. C. R. 611), affirmed, Can. Gazette, vol. 30, p. 561.

D.

Davies v. McMillan (ante p. 113, 122, 192), dismissed, non pros.

Dominion Cartridge Co. v. Cairns (28 Can. S. C. R. 361), leave refused.

E.

Education in Manitoba, In re Statutes respecting (22 Can. S. C. R. 577), varied (1895) A. C. 202.

F.

Ferguson v. Troop (17 Can. S. C. R. 527), leave refused.

Fisheries Case (26 Can. S. C. R. 444), varied (1898) A. C. 700.

G.

Gerow v. British American Assurance Co. (16 Can. S. C. R. 524), leave refused.

Grand Trunk Railway Co. v. Beaver (22 Can. S. C. R. 448), leave refused, Can. Gazette, vol. 23, p. 320.

Grand Trunk Ry. Co. v. Washington (28 Can. S. C. R. 184), affirmed, Can. Gazette, vol. 30, p. 543; vol. 31, pp. 343, 415; vol. 32, p. 514.

H.

Hamel v. Leduc (Nicolet Election Case), (29 Can. S. C. R.), leave refused.

Hayes v. Elmsley (23 Can. S. C. R. 625), leave refused.

Hoggan v. Esquimault & Nanaimo Railway Co. (20 Can. S. C. R. 235), affirmed (1894) A. C. 429.

Huson v. Township of South Norwich (24 Can. S. C. R. 145), see "Prohibitory Liquor Acts" case *infra*, affirmed.

I.

Indian Claims Case (25 Can. S. C. R. 434), affirmed, Can. Gazette, vol. 28, p. 272.

L.

Lemoine v. The City of Montreal (23 Can. S. C. R. 390), leave refused.

London & Canadian Loan & Agency Co. v. Duggan (20 Can. S. C. R. 481), reversed (1893) A. C. 506.

M.

Manitoba Acts respecting Education, *In re* (22 Can. S. C. R. 577), varied (1895) A. C. 202.

Mackenzie v. The Building and Loan Association (28 Can. S. C. R. 407), leave refused.

McLean v. Stewart (25 Can. S. C. R. 255), varied.

Meloche *et al.* v. Simpson *et al.* (29 Can. S. C. R.), leave refused. May, 1899.

N.

Nicolet Election Case (29 Can. S. C. R. 178), leave refused.

North Shore Railway Co. v. City of Quebec (27 Can. S. C. R. 102), affirmed Can. Gazette, vol. 31, p. 11.

Nova Scotia, Province of, *et al.*, v. Dominion of Canada (26 Can. S. C. R. 444), varied (1898) A. C. 700.

O.

Ontario & Quebec v. Dominion of Canada (26 Can. S. C. R. 444), varied (1898) A. C. 700.

P.

Prohibitory Liquor Acts (24 Can. S. C. R. 170), reversed (1896) A. C. 348.

Petrolea, Town of, v. Johnston, leave refused, Can. Gazette, vol. 30, p. 585.

Q.

Quebec, Ontario, etc., v. Dominion of Canada (26 Can. S. C. R. 444), varied (1898) A. C. 700.

R.

Raleigh, Township of, v. Williams (21 Can. S. C. R. 103), reversed (1893) A. C. 540.

Ross v. The Queen (25 Can. S. C. R. 564), affirmed.

S.

St. Louis v. The Queen (25 Can. S. C. R. 649), leave refused.

T.

Toronto, City of, v. Toronto Railway Co. (27 Can. S. C. R. 640), leave refused.

Toronto, City of, v. Virgo (22 Can. S. C. R. 447), affirmed (1896) A. C. 88.

Toronto Street Railway Co. v. The Queen (25 Can. S. C. R. 24), reversed (1896) A. C. 551.

U.

Union Bank of Canada v. O'Gara (22 Can. S. C. R. 404), dismissed, *non pros*, Can. Gazette, vol. 24, p. 224.

V.

Vancouver, City of, v. The Canadian Pacific Railway Co. (23 Can. S. C. R. 1), leave refused, Can. Gazette, vol. 23, p. 360.

APPENDIX "C."

LIST OF CASES SPECIALLY NOTICED.

A.

Allen v. Flood ([1898] A. C. 1; 14 T. L. R. 125), discussed. See TRADE UNION.

Anderson, Doe d. v. Todd (2 U. C. Q. B. 82), followed. See STATUTE OF MORTMAIN; WILL, 3.

Archbald v. deLisle (25 Can. S. C. R. 1), followed. See WARRANTY, 2.

Archibald v. Hubley (18 Can. S. C. R. 116), distinguished. See ASSIGNMENT, 1; CHATTEL MORTGAGE, 5. Archibald v. Hubley (18 Can. S. C. R. 116), followed. See CHATTEL MORTGAGE, 1.

Armstrong v. Hemstreet (22 O. R. 366) overruled. See FRAUDULENT PREFERENCES, 4; INSOLVENCY, 3.

Arpin v. The Queen (14 Can. S. C. R. 736), distinguished. See APPEAL, 37.

Attorney-General of B. C. v. Attorney-General of Canada (14 App. Cas. 295), commented on and distinguished. See RES JUDICATA, 2.

Attorney-General of Quebec v. The Queen Ins. Co. (3 App. Cas. 1090), distinguished. See CONSTITUTIONAL LAW, 12; LICENSE, 1.

Attorney-General of Nova Scotia v. Sheraton (28 N. S. Rep. 492), approved and followed. See LEASE, 2; MINES, 1.

B.

Bain v. Anderson *et al.* (24 Ont. App. R. 296), affirmed. See MASTER AND SERVANT, 13.

Bank of Toronto v. Lambe (12 App. Cas. 575), followed. See CONSTITUTIONAL LAW, 12; LICENSE, 1.

Bank of Toronto v. Les Curé, etc., de Ste. Vierge (12 Can. S. C. R. 25), followed. See APPEAL, 20.

Bank of Toronto v. Perkins (8 Can. S. C. R. 903), distinguished. See DEBTOR AND CREDITOR, 5.

Barrett v. City of Winnipeg ([1892] A. C. 445), followed. See CONSTITUTIONAL LAW, 3.

Bate v. Canadian Pacific Railway Co. (15 Ont. App. R. 388), distinguished. See RAILWAYS, 8; STATUTE, 19.

Bissonnette v. Laurent (15 R. L. 44), approved. See PRACTICE, 5.

Briggs v. Grand Trunk Railway Co. (24 U. C. Q. B. 516), approved and followed. See RAILWAYS, 13.

Brittlebank v. Grey-Jones (5 Man. L. R. 33), distinguished. See CONSTITUTIONAL LAW, 16; MARRIED WOMAN, 2; STATUTE, 27.

Brown et al. v. Town of Edmonton (1 N. W. T. Rep. part 4, p. 39; 23 Can. S. C. R. 308; 28 Can. S. C. R. 510), referred to. See CROWN, 3.

Building & Loan Association v. Mackenzie (24 Ont. App. R. 593), affirmed. See MERGER; MORTGAGE, 10.

Burns v. Davidson (21 O. R. 547), approved and followed. See ACTION, 8; LEX REI SITÆ, 1.

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C.

Canadian Pacific Railway Co. v. Ste. Thérèse (16 Can. S. C. R. 606), distinguished. See APPEAL, 14.

Chagnon v. Normand (16 Can. S. C. R. 661), followed. See APPEAL, 20.

Chamberland v. Fortier (23 Can. S. C. R. 371), referred to and approved. See APPEAL, 53.

Champoux v. Lapierre (Cass. Dig., 2 ed., 426), discussed and distinguished. See APPEAL, 73; OPPOSITION, 3.

Chef dit Vadeboncœur v. City of Montreal (29 Can. S. C. R. 9), followed. See PRACTICE, 43; SHERIFF, 2; SUBSTITUTION, 3.

Clayton's Case (1 Mer. 572), distinguished. See PRINCIPAL AND SURETY, 1.

Cornwall, Town of, v. Derochie (24 Can. S. C. R. 301), followed. See MUNICIPAL CORPORATION, 29; NEGLIGENCE, 25.

Couture v. Bouchard (21 Can. S. C. R. 181), followed. See APPEAL, 6; STATUTE 1.

Cowan v. Allen (26 Can. S. C. R. 292), followed. See CODICIL, 2.

Cowen v. Evans (22 Can. S. C. R. 331), followed. See APPEAL, 2.

Cox v. Worrall (26 N. S. Rep. 366), questioned. See ASSIGNMENT, 3; DEBTOR AND CREDITOR, 11.

Craig v. Great Western Railway Co. (24 U. C. Q. B. 509), approved and followed. See RAILWAYS, 13.

Cunningham v. Grand Trunk Railway Co. (9 L. C. Jur. 57), approved and followed. See RAILWAYS, 13.

D.

Danjou v. Marquis (3 Can. S. C. R. 251), followed. See APPEAL, 33, 38.

"Delta," The (1 P. D. 393), distinguished. See FOREIGN JUDGMENT; RES JUDICATA, 4.

Dixon v. Snetsinger (23 U. C. C. P. 235), discussed. See CONSTITUTIONAL LAW, 15; NAVIGABLE WATERS, 1.

Doe d. Anderson v. Todd (2 U. C. Q. B. 82), followed. See STATUTE OF MORTMAIN.

Dufresne v. Dixon (16 Can. S. C. R. 296), followed. See APPEAL, 8; PRACTICE, 5.

Dufresne v. Guevremont (26 Can. S. C. R. 216), followed. See APPEAL, 57; STATUTE, 29.

Durkee v. Flint (19 N. S. Rep. 487), approved and followed. See ASSIGNMENT, 1; CHATTEL MORTGAGE, 5.

E.

Eddy v. Eddy (p. 23, *ante*), followed in *Demers* v. *Bank of Montreal* (p. 287, *ante*).

Emmett v. Quinn (7 Ont. App. R. 306), distinguished. See MERGER; MORTGAGE, 10.

European Bank, *In re*, *Ex parte* The Oriental Commercial Bank (5 Ch. App. 358), followed. See PLEDGE, 1.

Ewart v Gordon (13 Gr. 40), discussed. See TRUSTS, 2.

F.

Filiatrault v. Goldie (Q. R. 2 Q. B. 368), distinguished. See IMMOVABLE PROPERTY, 1; MOVABLES, 1; VENDOR AND PURCHASER. 9.

Footner v. Figes (2 Sim. 319), followed. See PRACTICE, 16; STATUTE, 15.

Freeborn v. Vandusen (15 Ont. P. R. 264), followed. See PRACTICE, 17.

G.

Gardner v. Grace (1 F. & F. 359), followed. See NEGLIGENCE, 22.

Gendron v. McDougall (Cass. Dig. 2 ed., 429), followed. See APPEAL, 11; OPPOSITION, 3. Gendron v. McDougall (Cass. Dig. 2 ed., 429), discussed and distinguished. See APPEAL, 73.

Gibbons v. Wilson (17 Ont. P. R. 1), referred to. See DEBTOR AND CREDITOR, 12; FRAUDULENT PREFERENCES, 5.

Gilbert v. Gilman (16 Can. S. C. R. 189), followed. See APPEAL, 20.

Gilbert v. Lionais (7 R. L. 339), referred to. See PLEADING, 7.

Great Western Railway Co. of Canada v. Braid (1 Moo. P. C. [N. S.] 101), followed. See APPEAL, 75.

H.

Halstead v. Bank of Hamilton (24 Ont. App. R. 152), affirmed. See ASSIGNMENT, 5; BANKING, 6.

Hogaboom v. Receiver-General of Canada. *In re* The Central Bank of Canada (24 Ont. App. R. 470), affirmed. See BANKING, 5; WINDING-UP ACT, 3.

Holman v. Green (6 Can. S. C. R. 707), followed. See CONSTITUTIONAL LAW, 17.

Hunter v. Carrick (11 Can. S. C. R. 300), referred to. See PATENT OF INVENTION, 1

Hussey v. Horne-Payne (4 App. Cas. 311), followed. See CONTRACT, 21.

L.

Laberge v. The Equitable Life Assce. Society (24 Can. S. C. R. 59), distinguished. See APPEAL, 75.

Lainé v. Béland (26 Can. S. C. R. 419), distinguished. See IMMOVABLE PROPERTY, 1; MOVABLES, 1; VENDOR AND PURCHASER, 9.

Lambe v. Armstrong (27 Can. S. C. R. 390), followed. See PRACTICE, 42.

Lea v. Wallace *et al.* (33 N. B. Rep. 492), reversed. See MARRIED WOMAN, 4; STATUTE, 41.

"Leverington," The (11 P. D. 117), followed. See ADMIRALTY LAW, 2; MARITIME LAW, 3; SHIPS AND SHIPPING, 2.

Levi v. Reid (6 Can. S. C. R. 482), affirmed and followed. See APPEAL, 24.

Lizotte v. Descheneau (6 Legal News, 107), followed. See APPEAL, 70.

"Local Option Act," *In re* (18 Ont. App. R. 572), approved. See CONSTITUTIONAL LAW, 7.

M.

Macfarlane v. Leclerc (15 Moo. P. C. 181), distinguished. See ALIMENTARY ALLOWANCE, 1; APPEAL, 74.

Martley v. Carson (13 Can. S. C. R. 438), followed. See APPEAL, 49.

Mayor of Montreal v. Brown (2 App. Cas. 184), followed. See APPEAL, 26.

Mills v. Limoges (22 Can. S. C. R. 331), followed. See APPEAL, 2

Mitchell v. Trenholme (22 Can. S. C. R. 331), followed. See APPEAL, 2.

Moir v. Village of Huntingdon (19 Can. S. C. R. 363), followed. See APPEAL, 23.

Monette v. Lefebvre (16 Can. S. C. R. 387), followed. See APPEAL, 10.

Montreal, Mayor of, v. Brown (2 App. Cas. 184), followed. See APPEAL, 26.

Montreal, City of, v. Lemoine (23 Can. S. C. R. 390), distinguished. See APPEAL, 37.

Moore v. Jackson (22 Can. S. C. R. 210), referred to. See MARRIED WOMAN, 4; STATUTE, 41.

Murphy v. Labbé (27 Can. S. C. R. 126), approved and followed. See LANDLORD AND TENANT, 3; NEGLIGENCE, 34.

Murray v. The Queen (26 Can. S. C. R. 203), discussed and distinguished. See CONTRACT, 37.

Mc.

McCorkill v. Knight (3 Can. S. C. R. 233; Cass. Dig. (2 ed.), 694), followed. See OPPOSITION, 3.

McDonald v. Abbott (3 Can. S. C. R. 251), followed. See APPEAL, 33, 38.

McGreevy v. The Queen (18 Can. S. C. R. 371), followed. See RES JUDICATA, 6.

McGugan v. Smith (21 Can. S. C. R. 263), followed. See CONTRACT, 14.

N.

Nissouri West, Township of, v. Dorchester (14 O. R. 294), distinguished. See ASSESSMENT, 5.

North British and Mercantile Insurance Co. v. Tourville (25 Can. S. C. R. 117), followed. See APPEAL, 69.

O.

O'Brien, *In re* (16 Can. S. C. R. 197), referred to. See CONTEMPT OF COURT.

O'Dell v. Gregory (24 Can. S. C. R. 661), followed. See APPEAL, 58, 70.

Ontario Car Foundry Co. v. Farwell; Wallbridge v. Farwell (18 Can. S. C. R. 1), followed. See CONTRACT, 30.

Oriental Commercial Bank, *Ex parte, In re* European Bank (5 Ch. App. 358), followed. See PLEDGE, 1.

O'Shea v. O'Shea (15 P. D. 59), followed. See CONTEMPT OF COURT.

O'Sullivan v. Harty (13 Can. S. C. R. 431), followed. See APPEAL, 49.

P.

Perrault v. Gauthier *et al.* (Q. R. 6 Q. B. 65), affirmed. See ACTION, 17; TRADE UNION.

Pictou, Municipality of, v. Geldert ([1893] A. C. 524), followed. See MUNICIPAL CORPORATION, 25, 37; NUISANCE, 3.

Q.

Quebec Street Railway v. City of Quebec (10 Q. L. R. 205), referred to. See CONTRACT, 7.

Queen, The, v. Farwell (14 Can. S. C.R. 392), commented on and distinguished. See PRACTICE, 8; RES JUDICATA, 2.

R.

Raphael v. Maclaren (27 Can. S. C. R. 319), followed. See APPEAL, 70.

Reg. v. Dillon (10 Ont. P. R. 352) overruled. See BETTING; CRIMINAL LAW, 3; STATUTE, 11.

Richardson v. The Canada West Farmers Ins. Co. (16 U. C. C. P. 430), distinguished. See CARRIERS, 2; CONTRACT, 26.

Richelieu Election Case (21 Can. S. C. R. 168), followed. See ELECTION LAW, 3.

Robertson v. The Queen (6 Can. S. C. R. 52), followed. See CONSTITUTIONAL LAW, 17; FISHERIES, 2; RIPARIAN PROPRIETORS.

Rodier v. Lapierre (21 Can. S. C. R. 69), followed. See APPEAL, 58, 70.

Ross v. Hunter (7 Can. S. C. R. 289), distinguished. See MUNICIPAL CORPORATION, 21.

S.

St. Lawrence Forwarding, etc., Co. v. The Molsons Bank (28 L. C. Jur. 127), referred to. See BILL OF LADING, 2.

Sauvageau v. Gauthier (L. R. 5 P. C. 494), followed. See ALIMENTARY ALLOWANCE, 1; APPEAL, 74.

Schwersenski v. Vineberg (19 Can. S. C. R. 243), distinguished. See APPEAL, 37.

Sherbrooke, City of, v. McManamy (18 Can. S. C. R. 594), distinguished. See APPEAL, 22.

Smith v. Baker ([1891] A. C. 325), applied. See ACTION, 3; RAILWAYS, 11.

Smith v. Goldie (9 Can. S. C. R. 46), referred to. See PATENT OF INVENTION, 1.

Smith v. McLean (21 Can. S. C. R. 355), distinguished See CHATTEL MORTGAGE, 1.

Sovereign Ins. Co. v. Peters (12 Can. S. C. R. 33), distinguished. See INSURANCE, FIRE, 3.

Stanton v. Home Ins. Co. (2 Legal News, 314), approved. See APPEAL, 46.

Stephen v. McGillivray (18 Ont. App. R. 516), distinguished. See ASSESSMENT, 5.

Sydney, Town of, v. Bourke ([1895] A. C. 433), followed. See MUNICIPAL CORPORATION, 25, 37; NUISANCE, 3.

T.

Trust and Loan Co. v. Quintal (2 Dor. Q. B. 190), followed. See ACTION, 18; see PRACTICE, 43; SUBSTITUTION, 3.

Turcotte v. Dansereau (26 Can. S. C. R. 578), followed. See APPEAL, 73; OPPOSITION, 3.

V.

Vadeboncœur v. City of Montreal (29 Can. S. C. R. 9), followed. See PRACTICE, 43; SHERIFF, 2; SUBSTITUTION, 3.

Venner v. Sun Life Ins. Co. (17 Can. S. C. R. 394), followed. See CONDITIONS AND WARRANTIES, 2; CONTRACT, 42; INSURANCE, LIFE, 4.

Vercheres v. Varennes (19 Can. S. C. R. 356), distinguished. See APPEAL, 22.

Virtue v. Hayes (16 Can. S. C. R. 721), distinguished. See APPEAL, 14.

Vogel v. Grand Trunk Railway Co. of Canada (11 Can. S. C. R. 612), distinguished. See RAILWAYS, 8; STATUTE, 19.

W.

Wallbridge v. Farwell (18 Can. S. C. R. 1), followed. See CONTRACT, 30.

Walmsley v. Griffiths (13 Can. S. C. R. 434), followed. See APPEAL, 49.

Washington v. Grand Trunk Railway Co. (24 Ont. App. R. 183), reversed. See NEGLIGENCE, 30; RAILWAYS, 16.

Webster v. City of Sherbrooke (24 Can. S. C. R. 52), distinguished. See APPEAL, 23.

West Nissouri v. Dorchester (14 O. R. 294), distinguished. See ASSESSMENT, 5.

Williams v. Irving (22 Can. S. C. R. 108), followed. See STATUTE, 8.

Whitby, Corporation of, v. Liscombe (23 Gr. 1), followed. See STATUTE OF MORTMAIN; WILL, 3.

Wineberg v. Hampson (19 Can. S. C. R. 369), distinguished. See APPEAL, 15 (and incidentally under APPEAL 53).

Wyke v. Rogers (1 De G. M. & G. 408), followed. See DEBTOR AND CREDITOR, 7.

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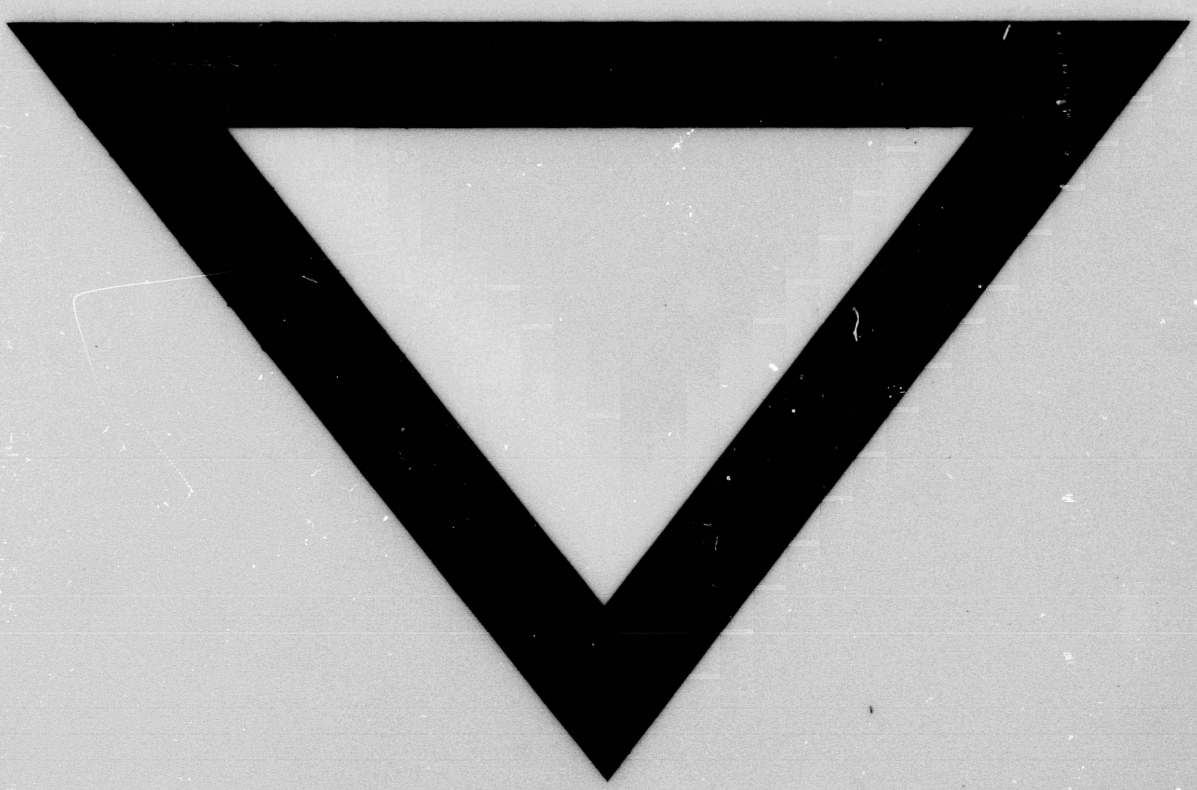
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