THE

Canadian Annual Digest

(1899)

COMPRISING

THE CASES REPORTED IN

SUPREME COURT OF CANADA REPORTS, VOL. 29.
EXCHEQUER COURT OF CANADA REPORTS, VOL. 6, NOS. 2, 3.
ONTARIO APPEAL REPORTS, VOL. 25, NO. 4; VOL. 26, NOS. 1, 2, 3, 4.
ONTARIO REPORTS, VOL. 29, NO. 5; VOL. 30, NOS. 1, 2, 3, 4, AND 5.
ONTARIO PRACTICE REPORTS, VOL. 18, NOS. 5, 6, 7, 8.
QUEBEC QUEEN'S BENCH REPORTS, VOL. 7, NO. 6; VOL. 8, NOS. 1-4.
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NEW BRUNSWICK REPORTS, VOL. 34, NO. 2.
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MANITOBA REPORTS, VOL. 12, NOS. 4, 5, 6.
BRITISH COLUMBIA REPORTS, VOL. 6, NOS. 1-7.

A SELECTION FROM 2 CANADIAN CRIMINAL CASES, 35 CANADA LAW JOURNAL, 19 CANADIAN LAW TIMES, 5 LA REVUE DE JURISPRUDENCE, AND 5 REVUE LEGALE (NEW SERIES).

ALSO THE CANADIAN CASES DECIDED BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DURING THE YEAR.

WITH

TABLES OF THE CASES DIGESTED AND CASES AFFIRMED, REVERSED, OR SPECIALLY CONSIDERED.

BY

CHARLES H. MASTERS, Q.C.,

REPORTER OF THE SUPREME COURT OF CANADA,

AND

CHARLES MORSE, B.C.L.

REPORTER OF THE EXCHEQUER COURT OF CANADA.

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CHIEF JUSTICES AND JUDGES

OF THE

Supreme and Exchequer Courts of Canada

AND OF THE

Superior Courts of the Several Provinces

During the Period of this Digest.

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" DÉSIRÉ GIROUARD.

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New Brunswick District	" EZEKIEL MCLEOD, J.
Prince Edward Island	" W. W. SULLIVAN, C.J.
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" D. A. MCKINNON.

Key to Abbreviations.

[1899] A.C.	Law Reports, Appeal Cases, 1899.
B.C.	British Columbia.
B.C.R.	British Columbia Reports.
Can. Cr. Cas.	Canadian Criminal Cases.
Can. Ex. C.R.	Reports Exchequer Court of Canada.
C.A. Dig.	Canadian Annual Digest.
C.C.	Civil Code (Quebec).
C.C.P.	Civil Code Procedure (Quebec).
C.L.J.	Canada Law Journal.
C.L.T. (Occ. N.)	Canadian Law Times (Occasional Notes).
C.S.C.	Consolidated Statutes of Canada.
C.S.B.C.	Consolidated Statutes, British Columbia.
D.	Dominion of Canada.
Ex. C.R.	Exchequer Court of Canada Reports.
Imp.	Imperial (Statute).
M.C.	Municipal Code, Quebec.
Man. R.	Manitoba Reports.
N.B.R.	New Brunswick Reports.
N.B. Eq.	New Brunswick Equity Reports.
N.S.R.	Nova Scotia Reports.
N.W.T.	North-West Territories of Canada.
O. } Ont. }	Province of Ontario.
Ont. App.	Ontario Appeal Reports.
Ont. Pr.	Ontario Practice Reports.
Ont. R.	Ontario Reports.
[ ] P.D.	Law Reports Probate Division.
[ ] Q.B. } Q.B.D. }	Law Reports, Quebec Bench Division.
Que. Q.B.	Quebec Reports, Queen's Bench.
Que. S.C.	Quebec Reports, Superior Court.
Que. P.R.	Quebec Practice Reports.
R.L.N.S.	Revue Legale New Series.
R.S.B.C.	Revised Statutes, British Columbia.
R.S.C.	Revised Statutes Canada.
R.S.M.	Revised Statutes Manitoba.
R.S.N.S.	Revised Statutes Nova Scotia.
R.S.O.	Revised Statutes Ontario.
R.S.Q.	Revised Statutes Quebec.
Rev. de Jur.	Revue de Jurisprudence.
S.C.R.	Supreme Court Canada Reports.

CORRIGENDA.

Column 283:—For 26 Ont. R., read 26 Ont. App.

Column 340:—For *Dunsmith*, read *Dunsmuir*.

Column 410:—For *Kittrick*, read *McKittrick*.

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OF

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—Reddition de compte—Notice of filing of account—Art. 115 C.C.P.]—In an action *en reddition de compte* the plaintiff is not deprived of his right to contest the account filed by not having received notice of its having been filed. *Greenwood* v. *Dent*, 2 Que. P.R. 125.

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III. Authority to Sue.

—Judicial abandonment—Authorisation of judge to institute proceedings—Jurisdiction of judge to grant such leave.]—The condition attached by law to the bringing of a suit by the curator is that he shall have obtained leave from the judge so to do. If he has not obtained such leave the power is not conferred and he is not the authorized mandatory of the debtor or his creditors, to render the estate liable for the costs and consequences of his action. —The power to grant this leave is only given to the judge or judges sitting in the district in which the judicial cession has been made, whatever is the district wherein the curator institutes his action. *Hains* v. *Vineburg*, 15 Que. S.C. 1.

—Action by wife separate as to property—Authorization of husband—Amendment of writ.] —A wife separate as to property cannot bring an action of damages for bodily injuries without her husband or his authorization; and where an action has been brought without the authorization of the husband a motion by the wife, for leave to amend the writ by inserting the name of the husband to authorize her, is illegal and cannot be granted. *McDonald* v. *Vineberg*. 15 Que. S.C. 267.

—Wife separate as to property—Authority by husband—Exception à la forme—Art. 176 C.C.]—An action on a promissory note against a wife separated as to property (*separée de biens*) without her husband having been brought into the cause to authorize it, will not be dismissed on exception to the form. *Richard* v. *Bernard*, 2 Que. P.R. 178.

IV. Bar to Action.

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—Plea in warranty—Succession—Renunciation—Art. 953 C.C.]—A plaintiff whose action is barred by a plea of warranty in relation to the property claimed by the action (Art. 953 C.C.) cannot renounce the succession after the trial in the cause so as to get rid of this disability. *Page* v. *McLennan*, 14 Que. S.C. 392.

—Agreement to bring action in foreign Court—B. C. Arbitration Act, s. 5—County Court Act, s. 34—Waiver.]—Where a defendant under s. 34 of the County Court Act B.C. objects to an action being tried in the County Court, and an order is made directing that the

plaint stand as a writ and that an appearance be entered thereto in five days, he waives his right to object to the jurisdiction of the Court to try the action on the ground that the parties have agreed that any action brought in respect of the cause of action sued upon shall be tried in another forum. *Howay* v. *Dominion Permanent*, 6 B.C.R. 551.

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—Condictio indebiti—Répétition de l'indu—Fictitious claims—Onus probandi—Arts. 1047, 1048, 1140 C.C.—Railway subsidies—54 V., c. 88 (Que.)—Insolvent company—Construction of railroad by new company—Payment of claims by Crown—Transfer by payee.]—A company formed for the construction of a subsidized railway having failed, another company undertook to complete it, and the Government of Quebec agreed to pay all the actual debts against the road out of the unearned subsidies. A., the contractor of the former company, presented a claim for $175,000, which was approved of and paid, whereupon he paid over $100,000 of the amount to P. for services performed in organizing the new company and obtaining payment of the claim. The Government afterwards brought an action against P. to recover back the $100,000 on the ground that A.'s claim was fictitious and was paid on false representations:—Held, that the action must fail if it could not have been maintained against A., that the onus was on the Crown of proving A.'s claim to be fictitious, and that the Crown not only failed to satisfy such onus, but the evidence clearly established the claim to be a just and reasonable one. Held, further, that the payment to A., with the consent of the new company, was a discharge to the Government *pro tanto* of the subsidy due to the company, and, if wrongfully paid, the latter only could recover it back. Held, also, that even if the Crown could have recovered the amount from A., it could not succeed against P., who, as the record shewed, had ample reason for believing that the company was indebted to A., as claimed. *Pacaud* v. *The Queen*, 29 S.C.R. 637.

—Curator to interdict for drunkenness—Authorization of wife.]—A person interdicted for drunkenness must be represented in legal proceedings by his curator: *Greene* v. *Mappin*, Mont. L.R. 5 Q.B. 108 followed, and *Sheppard* v. *Hoffman*, 12 Que. S.C. 228 overruled. Where the wife has been appointed curatrix to her husband interdicted for drunkenness, she is sufficiently authorized by her appointment for acts of simple administration, such as actions for the recovery of debts due to the interdict. Art. 3360 C.C. *Hoffman* v. *Lawrence*, 14 Que. S.C. 238.

—Aggravation of servitude—Flooding—Owner of land—Lessee under contract of purchase—Art. 501 C.C.]—The action which charges that work has been done on adjoining land in such a manner as to aggravate the servitude of the lower ground in regard to the flowing of water, should be brought against the registered owner of the adjoining land even when the work has been done by a lessee under contract of sale, and damages may be claimed as well as demolition of the works. The lessee, even under contract of sale, cannot answer to such action. *Kieffer* v. *Ecclesiastics of the Seminary of Foreign Missions*, 14 Que. S.C. 325.

—Minor—Personal action.]—An action against a minor personally will be dismissed on exception to the form. *Blandet* v. *Bédard*, 14 Que. S.C. 522.

—Minor—Personal action—Exception à la forme.]—An action by a minor who is not represented by a tutor is void, and will be dismissed on this ground on exception to the form. *Campetti* v. *Mayer*, 15 Que. S.C. 198.

—Action by husband and wife—Injury to wife—Community.]—An action for bodily injuries inflicted to wife assumed to be common as to property belongs to the community, and, therefore, must be brought by the husband alone. *Tondreau* v. *Semple*, 2 Que. P.R. 296.

—Personal action—General tutor—Arts. 249, 264, 290, 304 C.C.—Art. 174 C.C.P.]—A personal action against a debtor residing in the District of Quebec to recover a sum due in virtue of a deed of partition executed at Montreal, relating to a succession open at Montreal, must be brought by the general tutor of the minors claiming such sum, and such an action taken by a tutor specially appointed to administer the property of the

minors in the District of Montreal will be dismissed on an exception to the form. *Prévost* v. *Prévost*, 2 Que. P.R. 75.

—Damages from fires—Tenants in common—Right to sue.]—The plaintiff, a tenant in common with others of certain lands, but in possession under an agreement with the other tenants in common, that he was to have possession and ownership of the lands and all appertaining thereto, is entitled in his own name to sue and recover damages arising from the negligent setting fire by defendant on his own land, and its spreading to the land in possession of plaintiff.—*Phillips* v. *Phillips*, 34 N.B.R. 312.

—Husband and wife—Matrimonial rights—Domicile—Community—Action by wife.]

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VI. CONDITION PRECEDENT.

—Scire facias—Annulment of letters patent——Tender.]—It is not necessary that an action for the annulment of letters patent should be preceded or accompanied by tender or deposit of the dues paid to the Crown in order to obtain the issue of the letters patent. *The Queen* v. *Montmimy*, 29 S.C.R. 484.

—Condition—Notice of loss.]—A condition in a policy of insurance against fire provided that the assured "is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits." Held, following *Employers' Liability Assurance Corporation* v. *Taylor* (29 Can. S.C.R. 104), that compliance with this provision was a condition precedent to an action on the policy. *Atlas Assurance Co.* v. *Brownell*, 29 S.C.R. 537, reversing 31 N.S.R. 348.

—Arbitration—Condition precedent to right of action—Waiver by Crown.

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—Qui tam action—Grounds of defence.]—In an action *qui tam* the defendant cannot plead facts shewing that such action was brought to secure revenge; such allegations will be dismissed on *inscription en droit*. *Simard* v. *d'Hanterive*, 5 Revue Leg. N.S. 223.

— Séparation de corps—Réponse en droit—Grounds of defence.]—In an action by the husband for *séparation de corps* the defendant cannot set up as a defence grounds shewing that she has herself a right to a *séparation de corps* from her husband. *Privé* v. *Bradley*, 5 Revue Leg. N.S. 229.

—Action for support—Grounds of defence.]—To an action for support (*pension alimentaire*) defendants cannot plead that they have already paid an annual pension to the plaintiff's children. Nor is it a ground of defence that since the death of her husband the plaintiff, instead of living according to her means and condition, has lived extravagantly and incurred unnecessary expense. *DeTabb* v. *Clerk*, 5 Revue Leg. N.S. 231.

VIII. DISCONTINUANCE.

—Expropriation proceedings — Crown's right to discontinue—Costs.]—Where issue has been joined and the trial fixed in an expropriation proceeding the Crown may obtain an order to discontinue upon payment of defendants' costs; but the court will not require the Crown to give an undertaking for a *fiat* to issue upon any petition of right which the defendant may subsequently present. *The Queen* v. *Stewart*, 6 Can. Ex. C.R. 215.

—Settlement of action — Discontinuance — Costs of plaintiff's solicitor.]—Application by the plaintiff's solicitor on the record to set aside a discontinuance filed by the plaintiff, after a settlement of the action by a compromise arrangement between the plaintiff and defendant, without collusion, but yet without the knowledge of the plaintiff's solicitor, and after the cause was at issue. The plaintiff had settled on the assumption that his solicitor had agreed to accept $15 for the conduct of the whole action, and the defendant's solicitor produced an affidavit from the plaintiff that such an agreement had been made. The plaintiff's solicitor denied this, and his story of the transaction was accepted as more probable. Held, that the plaintiff could not discontinue after delivery of defence without the leave of the Court or a Judge, and Order 26, Rule 2, prevented the parties from settling, as the case had not been entered for trial. The discontinuance was set aside, and the defendant's course pointed out to be either to enter for trial, when one party may withdraw upon payment of the other's costs, and go to trial on the merits, or to tax costs up to date of settlement, when the Judge will order a discontinuance. [Johnston, Co. J. in Chambers.] *Netting* v. *Paton*, 19 C.L.T. (Occ. N.) 368.

IX. DISMISSAL OF ACTION.

—Action dismissed on preliminary exception—Payment of Costs—Institution of new action for the same cause—Art. 453 C.C.P. (old text.)]—A plaintiff whose action has been dismissed on a preliminary exception is not obliged to pay the costs of such action as a condition precedent to the institution of a new action for the same cause. The disposition of Art. 453 C.C.P. (old text) which was in force when the present action was brought and the plea filed, provides merely for the case where

a party who has discontinued an action seeks to begin again, and does not apply to the case of a plaintiff whose action has been dismissed on preliminary exception, and who seeks to begin anew. *Banque d'Hochelaga* v. *McConnell*, 14 Que. S.C. 240.

X. Form of Action.

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—Municipality—Action by special superintendent—Arts. 401, 807, 1042 M.C.]—The Superior Court has jurisdiction to entertain an action by a special superintendent appointed by the County Council to recover his costs taxed by said council whose decision has been affirmed by the Circuit Court of the County. *Martin* v. *Beauharnois*, 2 Que. P.R. 99.

XII. Hypothecary Action.

—Forum.]—An hypothecary action should, in the principal place of a district, be brought before the Superior Court and not the Circuit Court. *Labbé* v. *Routhier*, 8 Que. Q.B. 263.

—Declaration of non-ownership—Art. 2059 C.C.]—The defendant in an hypothecary action who declares in his defence that he has only the possession of the hypothecated immovable will not be compelled, on motion therefor, to disclose his title to such possession, nor the name of the owner of the immovable. *Valiquette* v. *Forget*, 2 Que. P.R. 116.

—Transfer of judgment—Signification—Proof—Arts. 1571, 2127 C.C.]—See Evidence, VII.

XIII. Joinder of Actions.

—Revocation of judgment uniting causes—Disadvantage.]—Where two causes have been joined by consent of the parties, and it subsequently appears that one of the parties will, by such joinder, be put to a disadvantage at the trial, the Court may, on motion, revoke and set aside the order joining the causes, even after a trial by jury—which was ineffectual owing to the failure of the jury to agree—and put the parties back in the position in which they were before the order was made. *Hooper* v. *Ross*, 15 Que. S.C. 122.

XIV. Jurisdiction.

—Railway company—Negligence in another province—Service of writ.]—In an action brought in Ontario against a railway company by the personal representative appointed in Ontario, of a person killed in British Columbia through the negligence there of servants of the company, the writ may be served on the defendants in Ontario in accordance with the provisions of Consolidated Rules 159 and 160. *Tytler* v. *Canadian Pacific Ry. Co.* 26 Ont. App. 467, affirming 29 Ont. R. 654 and C.A. Dig. (1898) 6.

XV. Lis Pendens.

—Seizure of movables—Opposition to seizure—Second action—Fresh seizure.]—Plaintiffs brought their action for instalments of rent and caused to be seized, by way of *saisie-gagerié*, the movable furniture in defendant's office. Defendant opposed the seizure by an opposition alleging that said movables were non-seizable. Pending these proceedings plaintiffs instituted a fresh action against defendants for instalments of rent accruing due since the first action was begun and caused the said movables to be seized anew. Upon exception by defendants setting up *lis pendens* and claiming that plaintiffs could not seize the movables anew before the question of their seizability on the first action was decided:—Held, that the award was no *lis pendens* in the case, and that plaintiffs could, for their second claim of instalments of rent accruing due since the first action was begun, cause the movables to be put in custody of the law to preserve their privilege in case they should be declared seizable in the first action. *Montreal Street Railway Co.* v. *Gauthier*, 14 Que. S.C. 147.

XVI. Mining Actions.

—Adverse actions—Mines—B.C. Mineral Act.]
See Mines and Minerals, II.

XVII. Money Paid.

—Universal legatee—Transfer of debt.]—The plaintiff had paid to one Dunn the sum of $150, and to that extent had cleared the property of his brother, whose universal legatee the defendant was. *Held*, that the plaintiff could recover said amount from defendant without previously obtaining a transfer from Dunn with signification to defendant, the money thus paid by plaintiff having enured to the defendant's benefit. *Gouge* v. *Beaumont*, 14 Que. S.C. 527.

—Revenue laws—Prosecution—Payment to procure discharge—Payment through agent.]
See Contract, VI.
" Principal and Agent, III.

XVIII. Notice of Action.

—Municipal corporation—Notice of action for damages—Art. 793 M.C.]—If Art. 793 of the Municipal Code (R.S.Q., Art. 6,169) requiring notice of suit, applies to actions of damages against municipal corporations (on which point the Court expressed a doubt), it is sufficient that the notice be plain and intelligible to an ordinary understanding, and as it appeared in this case that the notice was understood by defendant's secretary-treasurer, it was sufficient. *Davignon* v. *Corporation of Stanbridge Station*, 14 Que. S.C. 116.

—Public officer—Notary—Art. 22 C.C.P. (old text)—Art. 3607 R.S.Q.]—A notary is a public officer who cannot be sued for damages by reason of an act performed by him in the

exercise of his functions, unless notice of such action has been given to him at least one month before the issue of the writ. *Lasnier* v. *Dozois*, 15 Que. S.C. 604.

—Public officer—Commissioner of schools—Art. 88 C.C.P.]—A commissioner of schools is a public officer, and an action against him for damages arising out of something done in the exercise of his public duties should be preceded by the notice required by Art. 88 C.C.P. *Molleur* v. *Faubert*, 2 Que. P.R. 281.

—Municipal Corporations—Highway—Accident—Action—Notice.]

See MUNICIPAL CORPORATIONS, XI.

XIX. PENAL ACTION.

—Wife separated as to property—Commerçant—Registry of declaration—Registry after action—60 V., c. 49, s. 13 (P.Q.)—Art. 5502a R.S.Q.]—The declaration required by Art. 5502a R.S.Q. (added to Art. 5502 by 60 V., c. 49) of a wife separated as to property, who desires to engage in business, will not save her from the penalty imposed by said article if she has only sent it to the registrar of the county and not to the prothonotary of the district, and later, having discovered her error, filed it with the prothonotary before the institution of the action.—From the moment a violation of the law has been committed, the action resulting therefrom can only be prescribed by the expiry of the delay, if the law has established one, during which such action can be taken; good faith will not relieve the transgressor from the penalty incurred.—The proper registry of the declaration after the institution of the action will not afford relief from the penalty incurred for default of registry at the proper time. *Fraser* v. *Marquis*, 15 Que. S.C. 50.

XX. POSSESSORY ACTION.

—Action possessoire—Interference with possession—Acts of violence.]—In order that the possession of an immovable shall have been interfered with sufficiently to afford grounds for an action *en complainte*, it is not necessary that the defendant should have claimed to exercise a right over the other's property; it is sufficient that he ignores the right of the latter in committing upon the property encroachments and repeated acts of violence in spite of the protestations of the proprietor or party in possession. *Quebec District Ry. Co.* v. *Ray*, 8 Que. Q.B. 177, affirming 14 Que. S.C. 69.

XXI. RIGHT OF ACTION.

—Fire insurance—Assignment of interest in property insured—Arbitration—Award—Condition precedent.]—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—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 an award was a condition precedent to any right of action to recover a claim for loss under the policy. *Guerin* v. *Manchester Fire*, 29 S.C.R. 139.

—Refund of price paid—Exposure to eviction—Arts. 1511, 1535, 1586, 1591, 2060 C.C.—Actio condictio indebiti.]—The provisions of article 714 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 so 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. The procedure by petition provided by the Code of Civil Procedure for the vacating of sheriff's sales can only be invoked in cases where an action would lie. *The Trusts and Loan Company of Canada* v. *Quintal* (2 Dor. Q.B. 190), followed. *Deschamps* v. *Bury*, 29 S.C.R. 274.

—Liquor laws—Municipal corporation—Discretion of members of council—Refusal to confirm certificate.—In an action against a municipal corporation for damages claimed on account of the council of the municipality having, as alleged, illegally refused to confirm a certificate to enable the plaintiff to obtain a license for the sale of liquors in his hotel:—Held that the municipal council had a discretion under the provisions of the "Quebec License Law," (R.S.Q., art. 839,) to be exercised in the matter of the confirmation of such certificates for the exercise of which no action could lie, and further, that even if the members of the council had acted maliciously in refusing to confirm the certificate, there could be no right of action for damages against the corporation on that account. *Beach* v. *Township of Stanstead*, 29 S.C.R. 736 affirming 8 Que. Q.B. 276.

—Contract—Non-performance—Impossibility— No action lies for the non-performance of a term of a contract which term is on its face impossible of performance by any of the parties. *Stratford Gas Co.* v. *City of Stratford*, 25 Ont. App. 109.

—Damages—Married woman—Authorization—Arts. 176, 183 C.C.]—A wife cannot appear in judicial proceedings without her husband, or his authorization, even if she be a public trader or not common as to property. As soon as it appears to the Court that she is acting without such authorization, or leave of the Court, all proceedings in the case will be annulled and the parties put out of Court. —A married woman has a right, being thereto authorized by her husband, or on his refusal by the Court or judge, to sue in her own

name to vindicate her honour and to claim pecuniary compensation for damages for personal wrongs, such as slander and assault. *Héron* v. *Breton*, 15 Que. S.C. 339.

—Emancipated Minor—Action—Capital of obligation—Arts. 319, 320, 322 C.C.]—A minor enjoying the revenues from his property (*emancipé*) cannot, without the aid of his curator, bring an action to recover the principal of an obligation. *Cosgrain* v. *Malette*, 15 Que. S.C. 612.

—Double capacity of plaintiff—Acceptance of succession.]—A wife, testamentary executrix and universal legatee of her husband, can sue, in both capacities united, the debtors of the succession. She need not allege that she has accepted such succession. *Kehoe* v. *Paradis*, 2 Que. P.R. 59.

— School Commissioners — Resolution — Action against superintendent.]—An action will not lie against the president of a board of school commissioners for damages caused by a resolution of the board which he signed as president, but on which he did not vote. *Molleur* v. *Quevillon*, 2 Que. P.R. 311.

XXII. Settlement of Action.

—Pending reference—Duty of master—Dispute as to terms of settlement—Finding—Report—Opening up—Costs.]—Pending a reference to take accounts, a settlement was made between the parties, in the absence of their solicitors, but there was a dispute as to the terms. The Master gave the parties the alternative, on the suggestion of the plaintiff, either to proceed so as to determine whether the settlement did in fact end the matters in litigation, or to go on with the accounts as if there had been no settlement. The defendants, however, refused to take any further part in the proceedings in the Master's office. The Master found the fact of a settlement, and also that the defendants had agreed to pay the plaintiff's costs as part of the settlement, which the defendants disputed:—Held, on appeal from the Master's report, that it was competent for him to deal with the question whether there was or was not a settlement, and report according to the result. The course taken by him was according to the proper practice and within the scope of his jurisdiction. The decisions as to staying proceedings, upon summary application, in case of a compromise, are not necessarily applicable to a compromise arrived at pending a reference; see Rule 667. The defendants, however, should not be prejudiced by their having withheld before the Master any evidence to support the settlement in the terms which they asserted; and, therefore, the report should be opened up on payment of costs. *Corry* v. *Lemoine*, 18 Ont. Pr. 482.

XXIII. Severance.

—Promissory notes — Several notes by same maker—Art. 87 C.C.P.]—The holder of several promissory notes due by the same maker may—without violating the provisions of Art. 87 C.C.P.—bring against the debtor, on the same day, as many distinct actions as there are notes. *De Martigny* v. *Ouellette*, 15 Que. S.C. 249.

XXIV. Staying Action.

—Staying action on contract—Stipulation for award of engineer.]

See Arbitration and Award, I. (*a*).

XXV. Survival.

—Trespass to land—Death of plaintiff—Survival of Action.]—See Trespass to Land.

XXVI. Suspension of Action.

—Benefit society—Agreement as to remedy to be used—Validity thereof—By-laws.]—The plaintiff, on joining a benefit society, expressly bound himself to be subject to the laws and by-laws governing the same. One of the by-laws declared that no member should be entitled to bring any action or other legal proceeding against the society until he had first exhausted the remedies by appeal provided by the rules of the organization. Held, that such an agreement was not unconstitutional or void, and was not unreasonable on the part of members of a benefit society; and the plaintiff, therefore, was not entitled to bring an action of damages for unjustifiable suspension from membership and expulsion from a meeting of the society, until he had first taken the appeal provided for by the rules. *Godin* v. *Independent Order of Foresters*, 14 Que. S.C. 12.

XXVII. Warranty.

— Action en garantie — Formal guarantee—Defence — Attack on principal action.] — The defendant in warranty, in a case of formal guarantee (*garantie formelle*) cannot set up as against the plaintiff in warranty matters which tend to establish that the principal action is not well founded, but he should take the place of the plaintiff in warranty and set up these matters against the principal plaintiff. *Walker* v. *Pease*. 8 Que. Q.B. 218.

—Municipal winter roads—Maintenance—Action in warranty — Proprietor.]—Where a person was injured on a winter road which was allowed to remain in such a dangerous and illegal state the municipal corporation has a recourse in warranty against the proprietor opposite whose property the accident occurred, since it has been settled by the jurisprudence that the legal right to bring an action in warranty on an action for a tort, *quasi délit*, fully exists.—The road on which the accident occurred being a front road, the primary duty of laying it out, is on the proprietor liable to work on it, and not on the municipal officers. Consequently, the defendant in warranty cannot be exempted from liability by saying that he was under no obligation to construct any meeting place according to law

until it had been localized by the municipal officers. — Persons liable to perform work required by the provisions of the municipal law are always considered *in mord* to perform such work. *Rousseau* v. *Corporation of St. Nicolas*, 15 Que. S.C. 214.

— Personal debtor—Dilatory exception.] — A mere warranty (*garantie simple*) can have place only when a person is sued for a debt which is not his own and then she has a right to demand that the debtor should intervene and defend it, and in case of the defence not succeding that the *garant* be condemned to indemnify her. The defendant who is personally liable for the debt cannot have the action stayed upon *exception dilatoire* on alleging that a third party has assumed such debt. *Montreal Land & Improvement Co.* v. *Dinelle*, 15 Que. S.C. 241.

—Promissory note—Accommodation—Art. 177, C.C.P.]—In an action against the maker of a promissory note the latter can, by *exception dilatoire*, ask to call in warranty the person for whose accommodation the note was given if it was endorsed to the plaintiff without consideration and with the object of suing the maker. *Champagne* v. *Ste. Marie*, 2 Que. P.R. 111. And the maker has such right in any case. *Deserres* v. *Lefebore*, 2 Que. P.R. 133.

ADMIRALTY LAW.

See LIEN.
" SHIPPING.

ADMINISTRATION.

See BANKRUPTCY AND INSOLVENCY.
" EXECUTORS AND ADMINISTRATORS.
" PROBATE COURT.

ADMISSIONS.

—Minor—Délit—Arts. 986, 1007 C.C.]

See INFANT, VIII.

ADVOCATE.

See ATTORNEY.
" COUNSEL.
" SOLICITOR.

AFFIDAVIT.

See BILLS OF SALE AND CHATTEL MORTGAGES, I.
And see PRACTICE AND PROCEDURE, V.

AGENT.

—Practice—Solicitor's agents—Service on.]

See SOLICITOR.
And see PRINCIPAL AND AGENT.

AIDING AND ABETTING.

—Larceny—Accessory—Crim. Code s. 61 (c).]

See CRIMINAL LAW, I.

ALIEN.

—Chinamen—Working in coal mine—Coal Mines Regulation Act, 1890 (B.C.)—B.N.A. Act, s. 91, s.s. 25; s. 92, s.s. 10, 13.]

See CONSTITUTIONAL LAW, IV. (*b*)

ALIENATION.

—Restraint on—Validity—Will.]

See WILL, III.

ALIMENT.

—Property Devised à titre d'aliments—Seizure—Art. 599, C.C.P.]—Property devised for purposes of suppport (*à titre d'aliments*) can be seized for the expenses of maintenance owed by the legatee to a third party. *Crédit Foncier* v. *Martin*, 15 Que. S.C. 160.

—Action for support—Misconduct.]—A person sued by his mother-in-law for support cannot oppose to the action charges of misconduct by the plaintiff. *Poissant* v. *Racette*, 14 Que. S.C. 441.

—Seduction—Reparation—Pension alimentaire.]

See SEDUCTION.

—Action for support—Grounds of defence—Previous support of plaintiff's children—Extravagance of plaintiff.]—See ACTION, VII.

ALIMONY.

—Man. Queen's Bench Act, 1895, s. 31—Registering certificate of decree for alimony—Retrospective legislation.]—A decree for alimony, although obtained before the coming in force of the Queen's Bench Act, 1895, may under section 31 of that Act, be registered against lands, as legislation relating to procedure only, or improving the remedy, is *prima facie* applicable to existing proceedings or rights: *Wright* v. *Hale*, 6 H. & N. 227; and *Weldon* v. *Winslow* (1884), 13 Q.B.D. 784, followed; *The Queen* v. *Taylor*, 1 S.C.R. 65, and *Hughes* v. *Lumley*, 24 L.J.Q.B. 29, distinguished; *Foulds* v. *Foulds*, 12 Man. R. 381.

AMENDMENT.

See PLEADING.
" PRACTICE AND PROCEDURE.

ANIMALS.

—Damage caused by—Responsibility—Art. 1055 C.C.]—See NEGLIGENCE, VII.

APPEAL.

I. In Particular Matters.

—Habeas Corpus—Issue by judge of High Court—Non-appeal from judgment—Res Judicata.]—A person confined or restrained of his liberty is now limited to only one writ of *habeas corpus* to be granted by a Judge of the High Court, returnable before himself or before a Judge in Chambers, or before a Divisional Court, with a right of appeal to the Court of Appeal, whose judgment is final; and where no such appeal is taken, the judgment which might have been appealed against becomes final and conclusive, and may be pleaded as *res judicata*. *Taylor* v. *Scott*, 30 Ont. R. 475.

—Lis Pendens—Refusal to vacate—R.S.O., c. 51, s. 99.]—No appeal lies, by virtue of s. 99 of the Judicature Act, R.S.O., c. 51, or otherwise, from an order of a Master or Judge dismissing a motion made under s. 98 for an order vacating a certificate of *lis pendens*. *Hodge* v. *Hallamore*, 18 Ont. Pr. 447.

—Appeal to County Council—Expenses of councillors—Collection—Costs.]—A County Council, sitting in appeal as provided by the Municipal Code, cannot condemn a party to the appeal to pay to the members of the Council, who form the appellate tribunal, their travelling and living expenses. Such expenses are general, and should be proportionately borne by the local corporations of the county and paid by means of taxes imposed for general purposes by the said local corporations.—When an appeal is dismissed with costs, and it is not indicated to which party the costs are granted, the conclusion is that they are given to the party who succeeds; that is, the local corporation whose decision is appealed from. *County of Drummond* v. *Laferté*, 14 Que. S.C. 79.

—Court of Revision—Assessments—Assessor exceeding jurisdiction.]—Where an assessor exceeds his jurisdiction, the person assessed is not bound to appeal to the Court of Revision, but may successfully raise the question of his liability in an action to recover taxes. *Coquitlam* v. *Hoy*, 6 B.C.R. 546.

II. Inscription.

—Several respondents—Consolidation.]—In expropriation proceedings against several proprietors, a demand was made in each case for removal of the arbitrator of the proprietors. Separate proceedings were taken on each demand, but the causes were, by consent, consolidated before hearing, and the demands were all dismissed by one and the same judgment of a Judge in Chambers:—Held, that under the circumstances the railway company could appeal from the said judgment by a single inscription in appeal. *Richelieu East Valley Ry. Co.* v. *Menard*, 7 Que. Q.B. 486.

III. Interfering with Discretion.

—Insolvent company—Powers of liquidator—Authorization by Court—Exercise of discretion.]—The power of the Supreme Court (Que.) to authorize the liquidator of an insolvent company to act in the name of the company, and to settle pending proceedings, is a discretionary power, and the Court of Appeal should not interfere in the exercise of this discretion, except where the judge has exercised it unreasonably. *Morin* v. *Bilodeau*, 8 Que. Q.B. 330.

IV. Interfering with Questions of Fact.

—Findings of jury—Evidence—Concurrent findings of courts appealed from.]—In an action against a railway company for damages in consequence of plaintiff's 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 plaintiff's 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 company's premises and spreading to plaintiff's property. A verdict against the company was sustained by the Court of Appeal. Held, following *Sénésac* v. *Central Vermont Railway Co.*, 26 S.C.R. 641; *George Matthews Co.* v. *Bouchard*, 28 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*, 29 S.C.R. 201, affirming 25 Ont. App. 242.

—Evidence—Concurrent findings on questions of fact—Reversal on appeal.]—Although there may be concurrent findings on questions of

fact in both courts below, the Supreme Court of Canada will, upon appeal, interfere with their decision where it clearly appears that a gross injustice has been occasioned to the appellant, and there is evidence sufficient to justify findings to the contrary. Taschereau J. dissented, holding that as there had been concurrent findings in both courts below supported by the evidence, an appellate court ought not to interfere. *City of Montreal* v. *Cadieux*, 29 S.C.R. 616.

—Maritime law—Collision—Burden of Proof—Findings of trial judge.]—In this case there was a conflict of testimony on two questions of fact material to the decision of the case, both of which were found by the local Judge in Admiralty in favour of the defendants; the burden of proof being, in each case, upon the plaintiffs, and there being evidence to support the findings, the court on appeal declined to interfere with the same. *Inchmaree Steamship Company* v. *The "Astria,"* 6 Can. Ex.C.R. 218, affirming 6 Ex.C.R. 178.

V. Leave to Appeal and Time to Appeal.

—Appeal from Exchequer Court—Extension of time.]—After an appeal from the final judgment in the Exchequer Court on a Petition of Right had been lodged in the Supreme Court the Crown obtained leave to appeal from a former judgment in the cause ordering a reference as to damages the time for appealing from which had expired:—Held, that the Judge of the Exchequer Court had jurisdiction to allow such appeal. *The Queen* v. *Woodburn*, 29 S.C.R. 112.

—Extension of time—Grounds of refusal—Solicitor's affidavit — Practice.] — Judgment against suppliants was delivered on the 17th of January, and the time allowed for leave to appeal by the 51st section of the Exchequer Court Act expired on the 17th of February. On the 22nd of April following, the suppliants applied for an extension of the time to appeal on the ground that before judgment the suppliants' solicitor had been given instructions to appeal in the event of the judgment in the Exchequer Court going against them. There was no affidavit establishing this fact by the solicitor for the suppliants, but there was an affidavit made by an agent of the suppliants stating that such instructions were given and that he personally did not know of the judgment being delivered until the 27th of March. —Held, that the knowledge of the solicitor must be taken to be the knowledge of the company, that notice to him was notice to the company, and that as between the suppliants and the respondent the matter should be disposed of upon the basis of what he knew and did and not upon the knowledge or want of knowledge of the suppliants' manager or agent as to the state of the cause. Order refused. *Alliance Assurance Company* v. *The Queen*, 6 Can. Ex. C.R. 126.

—Leave—Refusal by court below—Stay of proceedings—Special circumstances—Judicature Act, Ont.] — Leave to appeal to the Court of Appeal from an order of a Divisional Court affirming an order of a Judge in Chambers, which set aside an order of a referee in Chambers, whereby the proceedings in the action were stayed pending the determination of an action in England brought by some of the present defendants, and to which the present plaintiffs were defendants, was refused by a Judge of the Court of Appeal, where such leave had previously been refused by the Court whose decision was complained of, where there were good grounds on which that decision could be supported, where none of the special circumstances existed which s. 77 of the Judicature Act makes essential, and there were no special reasons for treating the case as exceptional. *Great North West Central Ry. Co.* v. *Stevens*, 18 Ont. Pr. 392.

—Stay of proceedings—Action for rent—Pending reference as to title and other matters—Vendors and Purchasers Act—Scope of reference.]—The Court refused the plaintiff's leave to appeal from the decision of a Divisional Court affirming an order staying proceeding in this action, deeming that the action was unnecessary. *City of Toronto* v. *Canadian Pacific Ry. Co.*, 18 Ont. Pr. 451.

—Railway Co.—Expropriation—Objection to arbitrator—Demand for recusation—Appeal from judgment in chambers.]—A Railway Co. took proceedings, under the Quebec Railway Act, for expropriation against twenty-eight proprietors, and had framed as many demands for removal against the arbitrator of the proprietors. Separate proceedings were taken on each demand but the causes had, by consent, been consolidated before the hearing, and a Judge in Chambers dismissed all the demands by one and the same judgment. The Co. filed a single inscription in appeal, by which he brought in the twenty-eight proprietors as respondents, and he gave one security covering the costs and damages which each of the respondents would suffer. —Held, that the judgment in question was a final judgment and it was not necessary to obtain permission to appeal. *Richelieu East Valley Ry. Co.* v. *Menard*, 7 Que. Q.B. 486.

—Réformation de compte—Final judgment—Petition for leave to appeal.]—If, in an action *en reddition et en réformation de compte* an account has already been rendered in conformity with the first part of the conclusions of the demand, the judgment which eventually grants the reformation, at least for part of the account rendered before the institution of the action, is a final judgment from which there is an appeal *de plano* and without a necessity for leave. *Constine* v. *Hawes*, 2 Que. P.R. 83.

—Contesting privilege—Judgment for valuation—Final judgment—Art. 2013 C.C.—Art. 392 C.C.P.] —In an action to contest an architect's privilege a judgment declaring unnecessary the notice of registration of the privilege, and ordering the valuation of the immovable in

order to establish the higher value given to it by the plaintiff, is a final judgment appealable *de plano* and a petition for leave to appeal will be rejected. *Catholic Institution of Deaf Mutes* v. *Sincennes*, 2 Que. P.R. 294.

—Where same question before Privy Council.]—The Supreme Court of British Columbia will refuse (except in special circumstances) leave to appeal to Her Majesty, when the same question is before the Judicial Committee of the Privy Council in another case. *The Queen* v. *Little*, 6 B.C.R. 320.

—Place of hearing—Order before new Act came into force—B.C. Supreme Court Act Amendment Act, 1899.]—The Supreme Court Act Amendment, 1899, limiting the time for appealing against interlocutory orders to eight days does not apply to an order perfected before the Act came into force. In an action commenced in the Vancouver Registry the notice of appeal which was given after the Act came into force should have been given for the Full Court sitting at Vancouver. *Williamson* v. *Bank of Montreal*, 6 B.C.R. 480.

VI. Parties to Appeal.

—Cruelty to animals—Proceedings before justices—Agent of Society.]—If proceedings have been taken before justices of the peace by an agent of a Society for Prevention of Cruelty to Animals, the appeal from the decision of the justices should be taken by the agent himself and not by the Society. *Canadian Society for the Prevention of Cruelty to Animals* v. *Lauzon*, 5 Rev. de Jur. 259.

VII. Practice and Procedure.

—Third party—"Party affected by the appeal"—Rules 799, 811—Notices—Duty of plaintiff as appellant—Duty of defendants.]—The defendants, alleging that another person was liable to indemnify them against the plaintiff's claim, caused him to be served with a third party notice under Rule 209. The third party appeared, and an order was made under Rule 213 that he should be at liberty to appear at the trial and take such part as the judge should direct and be bound by the result; that the question of his liability to indemnify the defendants should be tried after the trial of the action; and that pleadings should be delivered between the defendants and him. The judge who tried the case dismissed the action, but held the third party bound to indemnify the defendants against any costs they incurred in the action. The third party appealed from this judgment to a Divisional Court, and the plaintiff appealed to the Court of Appeal; Held, that the third party was a "party affected by the appeal" of the plaintiff within the meaning of Rules 799 (2) and 811, and it was the plaintiff's duty to give the notices therein provided for; but there his duty as regards the third party ended, unless he was in a position to demand some relief against him; and the third party was not by the order made before the trial placed in the position of a defendant so as to entitle the plaintiff to relief against him. But, as the defendants, for their own convenience, brought the third party into the action, and did not procure him to be made a defendant, they should, if they desired to retain him before the Court for the purposes of the plaintiff's appeal, do whatever might be necessary to that end beyond what was required of the plaintiff under Rules 799 and 811. *Eckensweiller* v. *Coyle*, 18 Ont. Pr. 423.

—County Court action—Cross-Appeal.]—The respondent in a County Court appeal connot, without entering a cross-appeal, have any relief against the verdict appealed from. *Glines* v. *Cross*, 12 Man. R. 442.

VIII. Right of Appeal.

—Appeal to Privy Council—Construction of statute—Final judgment.]—Certain ratepayers of the City of Montreal having objections to one of the commissioners named in proceedings taken for the expropriation of land required for the improvement of a public street, in which they were interested, presented a petition to the Superior Court demanding his recusation. The petition was dismissed; on an appeal to the Court of Review, the judgment dismissing the petition was affirmed, and further appeal was then taken to the Supreme Court of Canada. On motion to quash the appeal for want of jurisdiction. Held, that no appeal *de plano* would lie from the judgment of the Court of Review to Her Majesty's Privy Council, and consequently there was no appeal therefrom to the Supreme Court of Canada under the provisions of the Act, 54 & 55 V., c. 25, s. 3, amending the Supreme and Exchequer Courts Act. Held, further, that the judgment of the Court of Review was not a final judgment within the meaning of s. 29 of the Supreme and Exchequer Courts Act. *Ethier* v. *Ewing*, 29 S.C.R. 446.

—Certiorari—Merchant's Shipping Act.]—An appeal lies to the Supreme Court of Canada from the judgment of a provincial court making absolute a rule *nisi* for a certiorari to bring up proceedings before a police magistrate under The Merchants' Shipping Act with a view to having the judgment thereon quashed. *The Queen* v. *The Sailing Ship Troop Company*, 29 S.C.R. 662.

—Appeal from Judge in Chambers—Expropriation Arbitration—Demand of recusation.]—By the terms of Art. 72 C.C.P. there is an appeal to the Court of Queen's Bench from every decision rendered by a Judge in Chambers and, therefore, there was an appeal in this case from the judgment dismissing the demands for removal of the arbitrator of the respondent in expropriation proceedings. *Richelieu East Valley Ry. Co.* v. *Menard*, 7 Que. Q.B. 486.

—Final and interlocutory judgments—Bornage.]—When a judgment, apparently interlocutory, really decides the contestation between the parties, it is held to be a final judgment.—

A judgment which fixes the division line between the properties of the plaintiff and defendant, and which orders *bornes* to be placed thereon, is a final judgment. All that follows such a judgment is merely the execution thereof, when the contestation between the parties was to determine that division line. *Singster* v. *Lacroix*, 14 Que. S.C. 89.

—Appeal from Judge in Chambers—Arts. 52 and 72 C.C.P.]—Under Art. 72 C.C.P. there can be no appeal from the decision of a Judge in Chambers, unless such decision, if it had been given by the Superior Court, would be appealable under Art. 52 C.C.P. *Bélanger* v. *Corporation of Montmagny*, 15 Que. S.C. 378.

—Exception déclinatorie—Arts. 46, 170 C.C.P.]—A judgment dismissing an *exception déclinatoire* is one which can be remedied by the final judgment in the cause, and a petition for leave to appeal therefrom will not be granted. *Auger* v. *Magann*, 2 Que. P.R. 161.

— Hypothecary action.] — An hypothecary action, whatever may be the amount involved, is appealable. *Longpré* v. *Perkins*, 2 Que. P.R. 307.

IX. Right to Take New Grounds.

—Municipal Act, 55 V., c. 33 (B.C.)—By-law—Accident to bridge.]—In an action against the City of Victoria to recover damages for a fatal accident caused by the breaking down of a bridge under its control, over which a tramcar containing the deceased was running:—Held, that the finding of the jury that an act done by their officer had materially weakened the beam which afterwards broke amply justified a verdict against them; and that the liability, if any, of the tram company for passing an extraordinarily heavy weight over it, not having been before the jury, could not be raised in appeal. *City of Victoria* v. *Patterson*, *City of Victoria* v. *Lang*, [1899] A.C. 615.

—Leave to adduce further evidence—Excessive Damages.]—In an action for damages for bodily injuries received by the plaintiff, owing to the alleged negligence of the defendants, the plaintiff recovered a verdict for $3,300, which a Divisional Court reduced to $2,000, if the plaintiff would consent, and in the alternative directed a new trial. The plaintiff accepted the reduction, but the defendants declined to do so, insisting that the damages, even as reduced, were excessive, and appealed to the Court of Appeal. Their appeal being set down, they moved for leave to give further evidence to shew that the damages were excessive, and, in order to shew that the damages were excessive, and, in order to shew that the plaintiff had recovered his health, and that the injury he sustained had not been so serious or of so permanent a character as was anticipated at the trial, they asked that he might be ordered to submit to a bodily examination by a surgeon, under Rule 462:—Held, that as the only object in getting in the proposed evidence was to reduce the damages still further, or to obtain a new trial, it was not reasonable that the defendants, having refused the relief the Court below offered, should be allowed to introduce this evidence on the appeal, and that they did not make out a sufficiently clear case for its admission. *Semble*, that the examination under Rule 462 is for discovery only, and is not evidence of the character contemplated by Rule 498 (1). *Fraser* v. *London Street Railway Co.*, 18 Ont. Pr. 370.

—Point not raised at trial.]—When no question is raised at the trial before the County Court Judge as to the sufficiency of the proof of the presentment of a promissory note, it is not open to the defendant to raise the question at the hearing of an appeal from the verdict as the judge might have given an opportunity to supplement the evidence, if the question had been raised before him. *Proctor* v. *Parker*, 12 Man. R. 528.

X. Security for Costs.

—Appeal bond—Defect in form—Uncertainty—Disallowance.]—A bond filed as security for cost of an appeal to the Supreme Court of Canada stated that the sureties were jointly and severally held and *jointly* bound, instead of *firmly* bound, and "we bind ourselves and each of us *by* himself," instead of *binds* himself:—Held, that it must be disallowed for uncertainty as to whether it could be properly construed as a joint and several bond. *Jamieson* v. *London and Canadian L. & A. Co.*, 18 Ont. Pr. 413.

—Appeal bond—Defect in form—Jurisdiction—Title to land—Servitude.]—A bond filed as security for costs of an appeal to the Supreme Court of Canada was disallowed on the ground of substantial error in the form—"*by*" instead of "*binds*" in the operative part. *Jamieson* v. *London and Canadian L. & A. Co.*, *ante*, followed. The appeal to the Court of Appeal was from the report of the Drainage Referee upon a reference to him of an action, which had been begun in a County Court and been removed into the High Court:—Held, that the action originated in the High Court. *Re Township of Raleigh and Township of Harwich*, Cassel's Practice of the Supreme Court of Canada, 2nd ed. p. 22, distinguished. Held, also, that, although the damages were no more than $25, an appeal lay, for the title to some interest in real estate came in question as the result of the judgment, which in effect decided that the defendant was not entitled to the servitude to which he contended that the plaintiffs' land was subject. *Young* v. *Tucker*, 18 Ont. Pr. 449.

—Deposit in review—Amount in controversy—Art. 1196 C.C.P.]—In actions for amounts greater than $400 it is necessary, in order to determine what deposit should be made to establish a distinction; if it is the defendant who inscribe in review the amount in con-

troversy will be, as to him, the damages awarded plus the costs and if the total of the two do not exceed $400 the deposit need only be $50; but if the inscription is by the plaintiff the amount in controversy will be the sum claimed by his action. The defendant may produce with the record the bill of costs taxed against him to assist in determining the amount in controversy as to him. *Samson* v. *Talbot*, 14 Que. S.C. 11.

—Inscription—Certificate of default—Art. 1213 C.C.P.]—When the opposite party has obtained from the prothonotary, by virtue of the provisions of Art. 1213 C.C.P., a certificate of default by the party who has inscribed in appeal to furnish the required security, the latter cannot afterwards obtain permission to furnish such security, the inscription in appeal being considered abandoned without recourse. *Stuart* v. *Enard*, 14 Que. S.C. 277.

—Motion to extend time—Art. 1213 C.C.P.]—If the security offered on the inscription in appeal is not furnished on the day named, and a certificate of default therein has been obtained from the prothonotary, the delay for furnishing such security will not be extended by the Court. *Baron* v. *Vallée*, 2 Que. P.R. 137.

XI. To Particular Courts.

(a) *Privy Council.*

—Validity of Provincial Statute—Leave in such Case.]—Leave to appeal to the Judicial Committee of the Privy Council upon a question of the constitutionality of a provincial statute will, except under special circumstances, be refused to the party convicted thereunder whose conviction has been affirmed in certiorari proceedings, if an appeal to the Privy Council is pending in a civil action between other parties in which the same question is being litigated. *The Queen* v. *Little*, 2 Can. Cr. Cas. 240.

(b) *Supreme Court of Canada.*

— Jurisdiction — Judgment in first instance varied.]—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 so as to give an appeal direct from the judgment of the Court of Review to the Supreme Court of Canada under the provisions of the third s.s. of s. 3, c. 25 of the statute 54 & 55 V. (Can.) amending the Supreme and Exchequer Courts Act. *Simpson* v. *Pallizer*, 29 S.C.R. 6.

— Jurisdiction — Criminal law — Criminal Code ss. 742-750 — New trial.]—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, ss. 742 to 750 inclusive. *Viau* v. *The Queen*, 29 S.C.R. 90, 2 Can. Cr. Cas. 540.

—60 & 61 V., c. 34—Application to pending cases.]—The Act 60 & 61 V., 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*, 29 S.C.R. 99.

—Question of local practice.]—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 appropriate relief although the question involved upon the appeal may be one of local practice only. *Lambe* v. *Armstrong* (27 S.C.R. 390) followed. *Eastern Townships Bank* v. *Swan*, 29 S.C.R. 193.

—Special leave—Form of application and order —Cross-appeal to Privy Council—Inscription pending such appeal—Stay of proceedings.]—In an order granting special leave to appeal to the Supreme Court of Canada, after the expiration of the time limited by the Supreme and Exchequer Courts Act, it is not necessary to set out the special circumstances under which such leave to appeal has been granted nor to state that such leave was granted under special circumstances.—Where the appellant had inscribed an appeal for hearing in the Supreme Court of Canada after he had received notice of an appeal taken in the same matter by the respondent to the Privy Council, upon motion on behalf of the respondent the proceedings in the Supreme Court appeal were stayed with costs against the appellant pending the decision of the Privy Council upon the respondent's appeal: *Eddy* v. *Eddy*, Coutlée's S.C. Dig. 23 followed; *Bank of Montreal* v. *Demers*, 29 S.C.R. 435.

—Security—Arts. 2054 and 2055 C.C.]—On an appeal to the Supreme Court, the appellant is not bound in an action *en déclaration d'hypothèque* to furnish security in the terms of s.s. *d* of s. 47 of the Supreme and Exchequer Courts Act, to the effect that he will not commit, or suffer to be committed, any waste on the property. *Consumers' Cordage Co.* v. *Converse*, 2 Que. P.R. 54.

(c) *Ontario Court of Appeal.*

—Order of Divisional Court quashing conviction —Quashing appeal — Costs.]—The Attorney-General certified his opinion, pursuant to s. 3 of R.S.O., c. 91, that the decision of the High Court quashing a conviction made under an Ontario statute involved a question on the construction of the British North America Act, and an appeal from such decision was brought on in the regular way; but as it plainly appeared to the Court of Appeal that the decision involved no such question, and the certificate of the Attorney-General appeared to have been granted inadvertently, in consequence of an authentic copy of the reasons for the judgment of the Court below not having been brought before him, the appeal was quashed, and with costs

to be paid by the prosecutor, the appellant, whose proceeding was in the nature of a *qui tam* action. *The Queen* v. *Reid*, 26 Ont. App. 181.

—**Jurisdiction—Conviction under municipal law.**]—No appeal lies to the Court of Appeal for Ontario from an order of a Divisional Court quashing a conviction by a police magistrate for breach of a municipal by-law. *The Queen* v. *Cushing*, 26 Ont. App. 248.

—**Order of Divisional Court—Leave to appeal—Solicitor's lien.**]—An appeal does not lie to the Court of Appeal unless by special leave, from an order of a Divisional Court made upon appeal from an order in Chambers enforcing a solicitor's lien for costs. *Walker* v. *Gurney-Tilden Co.*, 18 Ont. Pr. 471.

—**Assessment Appeal—Notice of—Non-prosecution—Motion to Dismiss.**]—Notice of an appeal to the Court of Appeal, under s. 84 (6) of the Assessment Act, R.S.O. c. 224, against the decision of a board of County Court Judges with respect to a municipal assessment was served by the municipality upon the railway company whose assessment was in question, but the motion was not set down to be heard nor proceeded with in any way. Upon motion by the railway company for an order dismissing the appeal:—Held, that the appeal, by force of s. 84 (6) was lodged in the Court of Appeal in like manner as an appeal from the decision of a County Court in an ordinary action becomes lodged—when the proper proceedings have been taken—in a Divisional Court, in which case Rule 790 or Rules 821 and 822 applied, and a motion to dismiss was unnecessary; or if not, that the appeal was not in the Court of Appeal at all, and no order could be made. *Re Toronto Railway Company and City of Toronto*, 18 Ont. Pr. 489.

(*d*) *Ontario Divisional Court.*

—**From County Court—Security for costs—Interlocutory order.**]—In an action in a County Court after judgment therein dismissing the action with costs and notice of appeal therefrom to the High Court given by the plaintiffs, an order was made by the Judge of the County Court, upon the application of the defendants, requiring the plaintiffs, within four weeks to give security for the costs of the action in addition to security already given, staying proceedings in the meantime, and directing that, in default of security being given within the time limited, the action should be dismissed with costs: Held, that this order was not in its nature final, but merely interlocutory, within the meaning of s. 52 (1) of the County Courts Act, R.S.O. c. 55, and no appeal lay therefrom. Held, also, that the provision of Rule 825, that no security for costs shall be required on a motion or appeal to a Divisional Court, applies to County Court appeals: and it must be assumed that the security ordered was not intended to extend to the costs of the appeal to the High Court from the judgment dismissing the action, nor the stay to the appeal itself. *Arnold* v. *Van Tuyl*, 30 Ont. R. 663.

(*e*) *Ontario Division Courts.*

—**R.S.O., c. 157—Master and servant—Action for wages—Justice of the Peace—Costs—Appeal—Division court.**]

See MASTER AND SERVANT, I.

(*f*) *Court of Queen's Bench, Quebec.*

—**Summary conviction—Appeal to Queen's Bench—Offence under provincial statute.**]—An appeal under Cr. Code 879, from a summary conviction in the Province of Quebec to the Court of Queen's Bench of that Province can only be taken where the offence charged is one within the legislative authority of the Parliament of Canada, and not where the offence is against a provincial statute. *Lecours* v. *Hurtubise*, 2 Can. Cr. Cas. 521.

(*g*) *Court of Queen's Bench, Manitoba.*

—**Appeal from County Court (Man.)—Review of evidence on appeal.**]—The plaintiff recovered judgment in the County Court for commission on the sale of a parcel of land for defendant at the full amount of percentage usually allowed. Defendant applied under s. 309 of the County Courts Act, R.S.M. c. 33, for a new trial or to reverse or vary the judgment, relying on the fact that another real estate agent had recovered a verdict against him for one-half the usual commission in respect of the same sale, and appealed to the Full Court from the County Court Judge's order dismissing that application.—Held, that on such an appeal the Court cannot review the original decision on the facts in the same manner as it would do on an appeal direct from the original verdict, and can only consider whether the decision of the County Court Judge on the application that was made was erroneous or not. On such an application it is not the duty of the judge to try the case anew, and he should not disturb the verdict he has rendered unless on reconsideration it appears to him that there has not been evidence on which a jury could have found as he did, or that his verdict has been arrived at through an oversight or misconception of the law or the evidence. On considering the evidence and applying these principles the appeal should be dismissed. The fact of the recovery by another plaintiff of commission in respect of the same sale was *res inter alios acta*, and was not in itself material. *Smith* v. *Smyth*, 9 Man. R. 569, followed. *Douglas* v. *Cross*, 12 Man. R. 533.

(*h*) *Supreme Court of British Columbia.*

—**Raising new defence on appeal.**]—The Full Court of British Columbia will not on an appeal allow a defence, based on non-compliance with the directions of the mineral

laws relating to location, to be set up unless it was raised in the Court appealed from. *Hogg* v. *Farrell*, 6 B.C.R. 387.

—Practice—Local Judge of the Supreme Court—Jurisdiction—Rule 1075—Order ultra vires—Whether nullity—Full Court—Jurisdiction on appeal—Rule 354—Costs.]

See PRACTICE AND PROCEDURE, LVIX.

APPEARANCE.

See PRACTICE AND PROCEDURE, XII.

ARBITRATION AND AWARD.

I. ARBITRATOR.

(*a*) *Capacity.*

—Staying action—Objection to engineer as arbitrator—Railway contract.]—A clause in a contract for railway construction provided that in case any dispute arose as to the meaning of the agreement, price to be paid, etc., it should be referred to the engineer of the railway company whose decision should be final. A dispute arising as to an alleged usage of allowing an increased percentage for earthwork in embankment, the contractor brought action for it; Held, on motion to stay the proceedings, that although the engineer had publicly and privately expressed himself to the effect that no such usage existed, yet as he swore that he would nevertheless give the plaintiffs' contention fair consideration should the matter come before him as arbitrator, the action must be stayed. *Jackson* v. *Barry R. W. Co.* [1892] 1 Ch. 238, specially referred to. *Sherwood* v. *Balch*, 30 Ont. R. 1.

(*b*) *Misconduct.*

—Refusal to state case.]—When questions of law arise in the course of arbitration proceedings any party thereto may apply to the arbitrator under s. 41 of the Arbitration Act, R.S.O. c. 62, to state a case for the opinion of the Court, and in the event of his refusal may apply to the Court to compel him to do so. The application may be made before the arbitrator gives a ruling on the questions of law, and the making of an order is in each case a matter of judicial discretion, the order granting or refusing the direction to the arbitrator being subject to appeal. *Re Jenison and Kakabeka Falls Land and Electric Co.* 25 Ont. App. 361.

(*c*) *Remuneration.*

—Arbitrators' fees—Basis of value.]—An arbitrator will not be allowed to fix his fees upon the basis of the value of his services in his own business or profession. What fees he should receive depends upon the particular circumstances of the case. The expert or professional man, who has been selected as arbitrator, because the matters in controversy are such as his special training and education enable him the more intelligently to determine, is not to be rated the same as one who has no exceptional qualification. In determining as to the reasonableness of his fees, regard must also be had to the nature and importance of the question in dispute, the amount of money involved, and the time necessarily occupied. *Re Sutton and Jewett Arbitration*, 1 N.B. Eq. 568.

II. AWARD.

— Municipal corporations — Lands injuriously affected — Compensation.]—Compensation for lands injuriously affected in the exercise of municipal powers is in the nature of damages, and interest should not be allowed thereon before the time of the liquidation of the damages by the making of the award. The distinction in this respect between such compensation and compensation for lands taken, or taken and injuriously affected, considered. *Re Leak and City of Toronto*, 26 Ont. App. 351, reversing 29 Ont. R. 685.

—Municipal corporations—Compensation—Filing of award.]—An award of compensation to a landowner for lands injuriously affected by reason of work done by a municipal corporation is an award which does not require adoption by the council, but is subject to an appeal to the High Court, as provided by R.S.O. c. 223, s. 465; and the practice as to the appeal is governed by R.S.O.c. 62, ss. 31, 34, 47. Where it is not shewn that such an award has been filed or that notice thereof has been served, an objection that an appeal therefrom is not in time cannot prevail. *Re McLellan and Township of Chinguacousy*, 18 Ont. Pr. 246.

—Action on—Pleas—Motion to set aside.]—Plaintiff applied to the Judge of the County Court, for District No. 5, to set aside as false, frivolous and vexatious the pleas pleaded by defendant to an action to recover the amount of an award made by J. in relation to matters in dispute between plaintiff and defendant. The learned judge set aside certain of the pleas, but allowed others to stand as raising questions which should be determined upon trial:—Held, that as the pleas fairly raised questions in relation to the construction of the agreement for submission to arbitration, and the regularity of the award, the cause must go to trial or hearing in the ordinary way. Under the agreement of reference, the questions in difference between the parties were referred to the award, order, &c., of M. & B., who were required to make and publish their

award before the 1st day of August, then next ensuing; or of such umpire as they should appoint, who was required to make and publish his award on or before the 10th day of August then next. No award having been made by the arbitrators by the 1st August, and the umpire not having made his award or extended the time for doing so until after the 10th August. *Quære*, whether the arbitrators or umpire had power to act after the dates mentioned. *Holmes* v. *Taylor*, 32 N.S.R. 191.

—Award under Ditches and Watercourses Act, Ont.]—See MUNICIPAL CORPORATIONS, VII.

III. COSTS OF PROCEEDINGS.

—Deduction of costs from amount of award.]—A Judge sitting in Chambers has no jurisdiction to order the costs of the successful party in an arbitration proceeding under B.C. Acts, 1873, No. 20 and 1892, c. 64, s. 3 (*i*), to be deducted from the amount awarded by the arbitrators. *Re Dwyer and the Victoria Waterworks Arbitration*, 6 B.C.R. 165.

IV. REMEDY BY ARBITRATION.

—Conditions of policy—Award—Right of action—Condition precedent.—See ACTION, XXI.

V. SETTING ASIDE AWARD.

—Time for making award—Extension—Indemnity—Excessive amount—59 V., c. 29 (Can.).]—Arbitrators appointed to determine the indemnity to be paid in an expropriation under The Railway Act had, at their first meeting, fixed July 6th, 1897, for making their award. On June 29th, after the *enquête* on the expropriation proceedings had closed, they adjourned, without any objection on the part of the railway company, their proceedings to July 8th:—Held, that such adjournment, made without objection, constituted a sufficient extension of the time fixed for making the award.—The judge, on appeal from an award, should only set it aside if the arbitrators have taken into consideration causes of indemnity which they should not have so taken, or have awarded an indemnity so disproportionate to that which they should have awarded that the Court is forced to conclude that an honest and reasonable man would not have given it. *Montreal Park and Island Ry. Co.* v. *Wynnes*, 14 Que. S.C. 409.

VI. STATUTORY ARBITRATION.

—Ditches and Watercourses Act, 1894 (Ont.)—Award—Defects.]—A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under the Ditches and Watercourses Act, 1894, of Ontario. *Township of Osgoode* v. *York* (24 Can. S.C.R. 282) followed.—If the initiating party is not really an owner the filing of a declaration of ownership under the Act will not confer jurisdiction.—Sec. 24 of the Act, which provides that an award thereunder, after expiration of the time for appealing to the judge, or after it is affirmed on appeal, shall be binding notwithstanding any defects in form or substance either in the award or any of the proceedings, does not validate an award or proceedings where the party initiating the latter is not an owner. *Township of McKillop* v. *Township of Logan*, 29 S.C.R. 702.

—Payment of amount of award into Court—Municipal Corporations—Waterworks Company—Mortgagees—Bondholders.]—Sections 445 & 446 of the Municipal Act, R.S.O. c. 223, which authorize the payment by a municipal corporation of money awarded for lands taken, with interest and costs into Court, apply to awards made under the Gas and Waterworks Companies Act, R.S.O. c. 199, s. 59, and an order for payment in may be amended so as to cover the proper amount payable, such payment to have effect only from the date of the amended order. It is no objection to such payment in that a controversy exists between the parties to the arbitration as to their respective rights thereunder; but mortgagees and bondholders of the Waterworks Company who are not parties to the arbitration should not be affected thereby. The acts of officers of a company, mortgagees in trust for bondholders of the Waterworks Company, under the circumstances of this case, set out in the report, in endeavouring to obtain payment of an amount awarded for the purchase money of the waterworks which acts were beyond the powers conferred by the mortgage, were held not to constitute a waiver of the rights of the mortgagees or an acquiescence in the award. *Re Arbitration between Town of Cornwall and Cornwall Waterworks Company*, 30 Ont. R. 81.

—Reference to Arbitration—Condition precedent to right of action—Waiver by Crown.]

See CONSTITUTIONAL LAW, V.

—Ditches and watercourses—Engineer's Award—Defective procedure in making same—Waiver.]

See MUNICIPAL CORPORATIONS, VII.

ARREST.

—Contract—Means of intimidation.]

See CONTRACT, VII.

—Foreigner temporarily resident in Ontario—Debt—Domicile.]

See DEBTOR AND CREDITOR, II.

ASSAULT.

—Criminal prosecution—Civil remedy—Alteration of charge—Certificate.]—Justices of the peace, before whom a charge of "shooting and wounding with intent to do grievous bodily harm" came on for preliminary hearing, changed it of their own motion to one of common assault and convicted and fined the accused. The information was laid by a

peace officer, and the person aggrieved attended the hearing pursuant to subpœna and gave evidence, and did not object when the charge was changed:—Held, that the justices had no right to alter the charge to one of common assault, and that their certificate of conviction and payment of the fine was a nullity and no bar under s. 866 of the Code to an action by the person aggrieved to recover damages. *Miller* v. *Lea*, 25 Ont. App. 428, 2 Can. Cr. Cas. 282.

—Married women—Authority to sue—Arts. 176, 183 C.C.]—See HUSBAND and WIFE, XI.

—Person demanding payment of account—Refusal to leave house—Expulsion—Arrest.]

See MALICIOUS PROSECUTION.
" CRIMINAL LAW.

ASSESSMENT AND TAXES.

I. ACTION TO RECOVER.

—Mistake—Payment of current taxes in ignorance of prior sale for arrears—Action to recover.]—Land belonging to a trust estate having been sold for taxes during the year allowed for redemption, the trustees, who had been newly appointed, paid the taxes for the current year in ignorance of the sale, and subsequently on learning the fact decided not to redeem, as the arrears exceeded the value of the land.—Held, that they were not entitled to recover back the money as paid under a mistake of fact. *Trusts Corporation of Ontario* v. *City of Toronto*, 30 Ont. R. 209.

—Recovery of assessments for school purposes.]

See SCHOOLS.

II. APPEALS.

—Assessment appeal—Notice of—Non-prosecution—Motion to dismiss.]

See APPEAL, XI. (*c*).

III. ASSESSMENT ROLL.

—Assessment roll—Person on roll not owner of property.]—The mere fact that a person is named in the assessment roll of a Municipality as the owner of certain real estate does not make him personally liable for the amount of the tax. Sections 134 and 155 of the Municipal Clauses Act (B.C.) considered. *Quære*, whether a person whose name was once properly on the assessment roll would be liable for taxes after he had parted with his interest in the property but had omitted to have his name removed. *Coquitlam* v. *Hoy*, 6 B.C.R. 458, affirmed 6 B.C.R. 546.

—Assessment roll—Parties alleged to be improperly on roll—Appeal from decision of Council—Mis-en-cause.]—See PARTIES, VIII.

IV. COLLECTION OF TAXES.

—Assessment—Trustee—Debtor and creditor.]—The relation existing between a county corporation and the local municipalities of which it is composed, in relation to money by-laws, is not that of an agent or trustee, but the county corporation is the creditor and the several local corporations are its debtors for the amount of taxes to be assessed upon their ratepayers respectively: *Township of Ascot* v. *County of Compton; Village of Lennoxville* v. *County of Compton*, 29 S.C. R. 228.

V. DISTRESS.

—Failure to distrain—Enforcing payment in a subsequent year.]—Where during all the time the roll is in the collector's hands there are goods and chattels available to answer the taxes but the collector fails to distrain, the amount due cannot be added to the taxes for a subsequent year and then levied by distress upon the goods of the tax debtor. The provisions of s. 135 of R.S.O. (1887) c. 193, [R.S.O. c. 224, s. 147], requiring the collector to state the reason for his failure to collect taxes and to furnish a duplicate of his account to the clerk are imperative and if they are not observed the amount due cannot be added to the taxes for a subsequent year, and then levied by distress upon the goods of the tax debtor. *Caston* v. *City of Toronto*, 26 Ont. App. 459, affirming 30 Ont. R. 16.

VI. EXEMPTIONS.

—Exemptions—"Public Hospital."]—The Sudbury General Hospital was the property of private individuals, and the profits derived from carrying it on belonged to them; it had not a perpetual foundation; no part of its income was derived from charity; it was not managed by a public body; but one object of it was the benefit of a large class of persons; and the Ontario Legislature had placed it in the list of institutions named in schedule A. to the Charity Aid Act, R S.O. 1897, c. 248, and declared it to be entitled to aid under the provisions of that Act, subjecting its by-laws to the control of the Executive of the Government and the hospital itself to Government inspection:—Held, that it was entitled to exemption from municipal taxation as being a "public hospital" within the meaning of

s.s. 5 of s. 7 of the Assessment Act, R.S.O. c. 224: *Blake* v. *Mayor, etc., of London* (1886-7), 18 Q.B.D. 437, 19 Q.B.D. 79 distinguished; *Struthers* v. *Town of Sudbury*, 30 Ont. R. 116.

—Municipal Code of Quebec, Art. 712, s.s. 3—Construction—Property of a Corporation—Liability to taxation.]—By the true construction of Art. 712, s.s. 3, of the Municipal Code of Quebec, property belonging to a corporation "for the ends for which they are established, and not possessed solely by them to derive a revenue therefrom," is not taxable.—But held, that a farm belonging to the appellant corporation and worked by them as a farm in order to derive revenue therefrom, is taxable, although not detached from the residue of the property and occasionally used for the above ends. *Seminary of Quebec* v. *Corporation of Limoilou* [1899] A.C. 288, affirming 7 Que. Q.B. 44.

—Exemption from taxation—Principles applicable.]—A contract exempting individuals from municipal taxation must be expressed in clear and unambiguous terms, and cannot be extended by implication. If, on any fair construction of the contract, there is a reasonable doubt whether the claim to exemption exists, this doubt must be solved in favour of the State. In other words, the language used must be of such a character as, fairly interpreted, leaves no room for controversy. Hence, a contract of exemption which stated that drains should not be charged to the estate of B., but that future purchasers of certain lots of the estate might be required to contribute to the cost of drains, does not exempt from assessment a purchaser of a lot not so specified in the contract, the principle that the mention of an exception implies a rule not availing to establish an exemption from taxation. *Beauvais* v. *City of Montreal*, 14 Que. S.C. 385.

—Railway company—Loan to aid construction—Tax on railway property—Subsidized road.]—A Municipal Council cannot levy upon the property of a railway company a tax to pay a loan which the municipality had agreed to for aid in constructing the railway.—All property of a railway company which has received from the Government of the Province, for the construction of a branch line, a subsidy distinct from those previously received, is exempt from taxation for a period of twenty years from the date of the first payment on account of the last subsidy, whether the property be or be not within the municipalities traversed by the subsidized branch. *Township of Dudswell* v. *Quebec Central Railway Co.*, 15 Que. S.C. 113.

—Exemptions—Actual residence or home of debtor.]—Defendant claimed that certain buildings seized in August, 1898, under execution, were exempt under s. 43, s.s. (*k*), R.S.M. c. 53, as being his actual residence or home. The evidence was that in September, 1897, defendant gave up his position as Indian agent at Berena River, and rented the buildings in question, in which he had been living and which he had erected on Crown land, to his successor in office. He then built a temporary loghouse on an island about one and a-half miles away, in which he lived with his family, and where he maintained himself by fishing. He afterwards tried to sell the building in question to the Dominion Government. He swore that his absence was only temporary, and that if he could not get the Government to purchase he intended to return and occupy the buildings as his own:—Held (Dubuc, J., dissenting) that the buildings had ceased to be the actual residence or home of the defendant, and were, therefore, not exempt from seizure. *Dixon* v. *McKay*, 12 Man. R. 514.

—Farm lands—Assessment of—Exemption.]

See MANDAMUS.

VII. LANDLORD AND TENANT.

—Taxes of former years—Tenant primarily liable.]—By the Assessment Act, R.S.O., c. 224, s. 26, any occupant may deduct from his rent any taxes paid by him, if the same could also have been recovered from the owner, or previous occupant, unless there is a special agreement between the occupant and the owner to the contrary:—Held, that under the above section a tenant is not at liberty to deduct from the rent and to compel his landlord to pay taxes for which the tenant and others were jointly assessed for a year prior to his existing tenancy: *Heyden* v. *Castle*, 15 Ont. R. 257, discussed. *Meehan* v. *Peers*, 30 Ont. R. 433.

VIII. LOCAL IMPROVEMENTS.

—Montreal Harbour Improvements—Widening Streets.]—A by-law passed in 1889 under the Quebec statute, 52 V., c. 79, s. 139, provided for a special loan in aid of the Montreal harbour improvements, and appropriated $163,750 thereof for the construction of a tunnel with approaches, as shewn on a plan annexed, from Craig street, in a line with Beaudry street, to the tunnel, passing by the side of W.'s land, and subsequently a resolution was passed to open, alongside the open-cut approach, a high, level roadway, to give communication from Craig street to Notre Dame street, on the surface of the ground. These works constituted, in fact, an extension of Beaudry street, from the line of Craig street, 77 feet in width, of which 42 feet constituted an open-cut approach to the tunnel and the remainder, the high level roadway, as shewn on the plans, this prolongation being 42 feet wider than Beaudry street. The resolution provided that a portion of the expense should be paid by the parties interested and benefited as for local improvements made by the "widening" of Beaudry street. Upon proceedings to quash the assessment, the Superior Court held that it was authorized and legalized as an "existing roll," by the Act 57 V., c. 57, s. 1, (Que.), and this judgment was

affirmed by the Court of Review. Held, that notwithstanding the reference therein to "existing rolls," the application of the latter Act should be restricted to the cost of the "widening" only of the streets therein named in cases where there were, at the time of its enactment, existing rolls prepared by the commissioners fixing the limits for that purpose, and these words could not have the effect of extending the nature and character of such works so as to include works manifestly forming part of the harbour improvement scheme and chargeable against the special loan. *White* v. *City of Montreal*, 29 S.C.R. 677.

—Frontage System—Assessment—Benefit—Appeal.]—See MUNICIPAL CORPORATIONS, XV.

IX. MUNICIPAL TAXES.

—Transient Traders—Assessment—Municipal Corporations—By-law.]

See MUNICIPAL CORPORATIONS, III. (*g*)

X. PRIVATE STREET.

—B.C. Municipal Clauses Act—Assessment of private streets.]—A street, the fee in which is in a private owner, who, however, cannot close it by reason of lots abutting thereon having been sold according to a plan shewing said street, should be assessed at a nominal figure only. An appeal lies from a decision of the Court of Revision in relation to the assessment of such property to a Judge of the Supreme Court. *In re Smith Assessment Appeal*, 6 B.C.R. 154.

XI. SCHOOL RATES.

—School Rates—Action in Circuit Court—Evocation to Superior Court—Future rights—Arts. 49, 54, 55 C.C P.]

See PRACTICE AND PROCEDURE XXIV.

And see SCHOOLS.

XII. SPECIAL ASSESSMENT.

—Special Assessment for drain—Prescription—Art. 4555 R.S.Q.]—A special assessment for the construction of a drain levied and payable in a single amount, overdue, is an "arrear of municipal taxes" within the meaning of Art. 4555 R.S.Q., and is prescribed by three years. *City of St. Henri* v. *Coursol*, 15 Que. S.C. 417, reversing 13 Que. S.C. 222, affirmed by Court of Queen's Bench Sept. 30th 1899.

XIII. TAX SALE.

—Tax sales—Assessment Act of Manitoba.]—Issue under The Real Property Act between plaintiff claiming under a tax sale deed and defendant the owner subject to the tax sale:—Held, that the tax sale should be set aside on the following grounds: No resolution of the council of the municipality was passed as required by The Assessment Act, R.S.M. c. 101, s. 148, directing the treasurer to prepare a list of lands liable to be sold for taxes prior to the preparation of same, or until after the reeve had signed the warrant to the treasurer to proceed with the sale. Only one of the two lists of land for sale was authenticated by the signature of the reeve and the seal of the municipality, whereas s. 148 of the Act requires that both lists should be so authenticated. There was no resolution of the council directing the treasurer in what newspaper the advertisement of the sale should be published, as the statute required when there is no newspaper published in the municipality, as in this case. At the sale, the land was bought for the municipality, but no resolution was passed by the council prior to the sale authorizing the reeve or any other member of the council to attend and bid:—Held, also, that the effect of ss. 190 and 191 of the Act, as amended by 55 V., c. 26, ss. 6 and 7, is to remedy only irregularities and not absolute nullities, and not to validate sales made on the basis of absolutely void proceedings as in this case. *O'Brien* v. *Cogswell*, 17 S.C.R. 420; and *Nanton* v. *Villeneuve*, 10 Man. R. 213 followed. *Tetrault* v. *Vaughan*, 12 Man. R. 457.

—Lien for taxes—Discharge of by sale—Release.]—A sale of land for taxes under a by-law passed pursuant to the B.C. Municipal Act, 1892, s. 104, s.s. 115, exhausts the lien of the municipality upon the lands, for taxes, given by s. 202 of the Act; and the purchaser at the tax sale takes the lands discharged of any lien in respect of taxes actually due at the time of the sale over and above the taxes for which the land was sold. *Jamieson* v. *City of Victoria*, 6 B.C.R. 109.

XIV. VALUATION.

—Valuation of immovable—"Valeur actuelle"—Charter of Montreal.]—The words "real value" (*valeur actuelle*) in s. 92 of 52 V., c. 79 (Charter of Montreal, 1889), which govern the mode of valuing immovable property for the purpose of levying rates and assessments, mean the mercenary value (*valeur vénale*), that is, the value which the owner could obtain for the property if there was a purchaser who needed to secure it. *Cassils* v. *City of Montreal*, 14 Que. S.C. 269.

ASSIGNMENT.

—Chose in action—Equitable assignment—Subsequent writing—Priority on fund.]

See CHOSE IN ACTION, EQUITABLE ASSIGNMENT.

—Interest in land—Equitable estate.]

See EQUITABLE ASSIGNMENT.

—Transfer of mortgage—Assignment of rights under policy.]—See INSURANCE.

—Mortgage—Assignment of equity—Covenant to indemnify—Assignment of covenant.]

See MORTGAGE.

ATTACHMENT.

—Garnishment—Saisie-arrêt—Seizure of share in partnership—Declaration by garnishee—Art. 698 C.C.P.]—See GARNISHEE.

—Cession de biens—Demand—Contestation without grounds—Seizure before judgment—Art. 931 C.C.P.]

See SAISIE-ARRÊT.
" DEBTOR AND CREDITOR.
" GARNISHEE.

ATTORNEY.

—Unprofessional conduct—Suspension—Prohibition.]—A writ of prohibition cannot issue to rectify the judgment, however erroneous it may be, of an inferior Court.—In this case the Council of the Bar of Montreal were competent to hear and decide upon a charge against H., a practising attorney, of having obtained from a client a sum of $60 in order to inscribe for review a judgment dismissing a *saisie-arrêt* that H. had caused to be issued as attorney for the cemplainant, while he had then himself settled the matter with the attorney of the opposite party who had paid him his costs, these facts being of a nature to constitute, *primâ facie*, a proceeding derogatory to professional honour. And the fact that H. might have had an interest in the proceeding in question as a partner of the complainant under his wife's name, and that he had besides a claim for more than $200 against the complainant for fees and disbursements, could not take the acts charged from the disciplinary control of the Council of the Bar, nor prevent the Council from proceeding upon the charge submitted to it, as the law gives to the Bar jurisdiction over all the professional acts of its members without exception or distinction.—The allegation that the Council of the Bar had adjudged without proof or contrary to the facts, and had not taken the *enquête* in writing or by notes, is not sufficient to authorize the issue of a writ of prohibition; but the Council not having taken notes of the evidence given before it as it should have done, and having thereby deprived H. of the benefit of an appeal to the General Council of the Bar which the law would give him, H. should not have been condemned to pay the costs of the proceedings.—(By the Superior Court and Court of Review): The fact that the complainant would have abandoned the charge against H. could not preclude the disciplinary action of the Council nor affect in any manner the sentence pronounced by it. *Bar of Montreal* v. *Honan*, 8 Que. Q.B. 26, affirmed by Supreme Court.

—Mandat—Joint or several obligation.]—When instructions (*mandat*) are given to an attorney by two or more persons to institute judicial proceedings, the obligation of such persons (*mandants*) to the attorney (*mandataire*) is joint and several (*solidaire*). *Crépeau* v. *Beauchesne*, 14 Que. S.C. 495.

—Parties to action—Art. 81 C.C.P.]—The attorney of a succession is not entitled to plead in his own name in his quality of attorney. *Lalonde* v. *Legault*, 15 Que. S.C. 297.

—Abandonment of judgment—Mandate of attorney—Art. 548 C.C.P.]—An attorney *ad litem* cannot desist from a judgment rendered in favour of his client without being specially authorized to that effect. *Warminton* v. *Town of Westmount*, 2 Que. P.R. 139.

—Péremption d'instance—Motion—Signature.]—A motion for *péremption d'instance*, signed by an attorney other than the one on the record, will not be entertained. *Allen* v. *Monday*, 2 Que. P.R. 235.

—Privilege—County Court—City Court of Saint John.]—An attorney of the Supreme Court has no privilege to maintain his personal action in the County Court when the City Court of Saint John has jurisdiction. *Simonds* v. *Hallett*, 34 N.B.R. 216.

—British Columbia—Admission of attorney from another province.]—An attorney from another province, who, if originally admitted in B.C., would have had to serve five years, must shew five years' service before he can be admitted in B.C. *Gwillim* v. *Law Society of British Columbia*, 6 B.C.R. 147.

—Distraction of costs—Execution in attorney's name—Opposition to seizure—Plaintiff's right to control.]—See COSTS, IV.

—Judgment for costs—Copy of taxed bill—Proof.]—See COSTS, XIII.

—Saisie-arrêt after judgment—Contesting declaration—Authority of contestant's attorney—Execution of judgment—Distraction of costs—Assignment of judgment—Litigious rights.]

See JUDGMENT, SAISIE-ARRÊT.

—Motion—Designation of attorney—Abbreviated form—Prejudice.]

See PRACTICE AND PROCEDURE, XL.
And see SOLICITOR.

ATTORNEY-GENERAL.

—Constitutional Question—Certificate of Attorney-General—Inadvertence.]—The Attorney-General certified his opinion, pursuant to s. 3 of R.S.O., c. 91, that the decision of the High Court quashing a conviction made under an Ontario statute involved a question on the construction of the British North America Act, and an appeal from such decision was brought on in the regular way; but, as it plainly appeared to the Court of Appeal that the decision involved no such question, and the certificate of the Attorney-General appeared to have been granted inadvertently, in consequence of an authentic copy of the reasons for the judgment of the Court below not having been brought before

him, the appeal was quashed, and with costs to be paid by the prosecutor, the appellant, whose proceeding was in the nature of a *qui tam* action. *The Queen* v. *Reid*, 26 Ont. App. 181.

AUCTION.

See SALE OF GOODS.

AUCTIONEER.

—Power of Municipal Corporation to regulate and Govern.]

See MUNICIPAL CORPORATIONS, III. (*g*).

BAIL.

—Capias—Abandonment—Discharge of Debtor—Effect on Surety.]—See CAPIAS.

—Criminal law—Recognisance of bail—Condition to appear for sentence—Conviction—Estreating recognisance.]—See CRIMINAL LAW, II.

BAILIFF.

—Seizure — Appointment of Guardian — Minor son of debtor—Deterioration of effects.]—On Feb. 27th, 1892, the plaintiff, through a bailiff, the *intervenant*, caused the effects of one L. to be seized, and the bailiff accepted as guarantee of the effects the minor son of L. An opposition was taken to the seizure, which was dismissed on Mar. 30th, 1894. Plaintiff delayed further proceedings until June 11th, 1894, when he caused to be issued a writ of *venditioni exponas*, but L. and the guardian had then left the country and the effects seized had disappeared. In an action *en responsabilité* against the defendant Corporation as surety of the *intervenant*:—Held, that even assuming that the seizure had become of no effect by the lapse of two months between the dismissal of the opposition and issue of the writ of *venditioni exponas*, the guardian was not, in the absence of a demand therefor on his part, discharged from his obligation to take care of the effects:—Held further, that articles 20 and 22 of title 19 of the ordinance of 1667, providing that the guardian shall be discharged *deplein droit* by the lapse of two months from the dismissal of an opposition, have been repealed by the Code of Civil Procedure. *Archambault* v. *Society of Bailiffs of Montreal*, 14 Que. S.C. 213.

BAILMENT.

—Livery stable keeper—Duty to warn customer of risks.]—Plaintiff, a livery stable keeper at Sydney, C.B., hired a horse and sleigh to defendant, a resident of Pictou, N.S., for the purpose of driving from Sydney to North Sydney and back. At the time when the hiring took place the river and harbour between Sydney and North Sydney were frozen over, and were generally used by the travelling public as a highway. Plaintiff was aware that defendant intended to make use of the road over the ice, and gave him directions as to the course he should take. In returning, after dark, the horse and sleigh went through the ice and were lost. Held, affirming the judgment of the County Judge, in favour of defendant with costs, and dismissing plaintiff's appeal with costs, that it was incumbent upon plaintiff to warn defendant of any circumstances which might render his journey dangerous, either going or returning, and that he must be taken to have contemplated the risks incident to the road, of which the accident that happened was one. *McKenzie* v. *Lewis*, 31 N.S.R. 408.

BANKRUPTCY AND INSOLVENCY.

I. ADMINISTRATION OF ESTATE.
II. ASSIGNEE.
III. ASSIGNMENT.
IV. CESSION DE BIENS.
V. CLAIMS AGAINST ESTATE.
VI. COMPOSITION WITH CREDITORS.
VII. COSTS AGAINST CURATOR.
VIII. POSSESSION OF ASSETS.
IX. PRIVILEGE OF UNPAID VENDOR.

I. ADMINISTRATION OF ESTATE.

—Purchase of insolvent estate—Refusal to complete—Action by curator—Special damages—Res judicata.]—A merchant in Ottawa purchased the assets of an insolvent trader in Hull, Que., but refused to accept delivery of the same. The curator of the estate brought an action in the Superior Court of Quebec to compel him to do so and obtained judgment, whereupon he accepted delivery and paid the purchase money. The curator subsequently brought another action in Ontario for special damages alleged to have been incurred in the care and preservation of the assets from the time of the purchase until the delivery:—Held, that under the law of Quebec, by which the case was governed, the curator was entitled to recover the expenses and disbursements which, as a prudent administrator, he was obliged to make for the safekeeping of the property; Held, also that these special damages, most of which could not be ascertained until after the purchase was completed, could not have been included in the action brought in the Quebec courts, and the right to recover them was not *res judicata* by the judgment in that action. *Hyde* v. *Lindsay*, 29 S.C.R. 595.

—Purchase by inspector—Mandate—Trusts.]—An inspector of an insolvent estate is a person having duties of a fiduciary nature to perform in respect thereto, and he cannot be allowed to become purchaser, on his own account, of any part of the estate of the

insolvent. *Davis* v. *Kerr*, 17 S.C.R. 235 followed. *Gastonguay* v. *Savoie*, 29 S.C.R. 613.

II. Assignee.

—Costs of action brought by—Remuneration—Disbursements.]—An assignee for the benefit of creditors, under the Assignments Act, cannot charge creditors personally with the costs of an action brought by him on behalf of the insolvent estate, unless upon a direct or implied promise of indemnity, but must look to the assets of the estate; and so, too, with regard to his remuneration for and disbursements in winding up the estate. *Johnston* v. *Dulmage*, 30 Ont. R. 233.

—Business carried on by Assignee for Creditors—Note of Assignee—Personal Liability—Signature as agent.]—An assignee of a partnership, conducting the business under a trust deed for the benefit of the creditors, gave promissory notes to the plaintiffs for goods supplied to him in connection therewith, and signed them in the firm name, followed by his own, with the word "assignee" added. The deed gave him no authority to make notes or accept bills on behalf of the firm, and the plaintiffs had previously refused to draw on the latter, requiring his own acceptance:—Held, that under these circumstances, and having regard to section 26 of the Bills of Exchange Act, he was personally liable on the notes. *Boyd* v. *Mortimer*, 30 Ont. R. 290.

—Appeal—County Court Judge—Persona designata.]—By s. 30 of the Assignments Act, R.S.O. c. 147, an assignee for the benefit of creditors is enabled to take the proceedings authorized by s. 32 of the Creditors' Relief Act, R.S.O. c. 78, and, if he does so, the provisions of ss. 32 and 33 of that Act are to apply, *mutatis mutandis*, to proceedings for the distribution of moneys and determination of claims arising under an assignment:—Held, that an order of a County Court Judge dismissing an application by a claimant, under s. 30, to vary the scheme of distribution made by the assignee of a debtor, was made by him as *persona designata*, and there was no appeal therefrom either by virtue of s. 38 of the Creditors' Relief Act, or of s. 52 of the County Courts Act, R.S.O. c. 55, or otherwise. *Re Pacquette*, 11 Ont. Pr. 463, and *re Young*, 14 Ont. Pr. 303, approved and followed. *Re Waldie and Village of Burlington*, 13 Ont. App. 104 distinguished. *Re Simpson and Clafferty*, 18 Ont. Pr. 402.

III. Assignments.

—Preferences—Landlord and Tenant—Rent—Acceleration Clause—"Current Quarter"—58 V., c. 26, s. 3, s.s. 1. (Ont.).]—By a lease made on the 31st of October, 1895, certain premises were demised for a term of three years from the 1st of November, 1895, at a yearly rent of $480, payable, in advance, in even portions monthly on the first day of each month, the first payment to be made on the 1st of November, 1895. The lease contained the usual statutory covenants and provisoes, and express power of entry and distress for rent in arrear, and also the following provision:—"If the lessee shall make any assignment for the benefit of creditors . . the then current quarter's rent shall immediately become due and payable." On the 31st of January, 1896, the lessor, who also held a chattel mortgage on the goods on the demised premises as collateral security for the payment of certain indebtedness of the lessees, took possession both as mortgagee and by way of distress for rent in arrear, only $40 having up to that time been paid to her on account of rent. On the same day the lessees made an assignment for the benefit of creditors and by consent the goods on the demised premises, which were of far more value than $200, were sold by the lessor and were removed from the demised premises before the last day of February. The lessor retained out of the proceeds of the goods $200, rent for December, 1895, and January, February, March and April, 1896:—Held, per Burton, C.J.O., and MacLennan, J.A.—That s.s. 1 of s. 3 of 58 V., c. 26 (Ont.), now R.S.O. c. 170, s. 34, s.s. 1, is a restrictive provision, and limits the landlord's lien even though in the lease under which he claims there is an acceleration clause wider in its terms than the statutory provision, and that it does not give to the landlord an absolute right to three months' rent upon an assignment for the benefit of creditors being made. *Clarke* v. *Reid*, 27 Ont. R. 618, disapproved. In the result the judgment of Falconbridge, J., allowing the lessor rent for the months of February, March, and April, was varied by disallowing rent for March and April. *Langley* v. *Meir*, 25 Ont. App. 372.

—Fraudulent conveyance—Consideration—Untrue statement—Onus of proof—Sheriff.]—*Gignac* v. *Iler*, 25 Ont. App. 393, affirming 29 Ont. R. 147 and C.A. Dig. (1898) 155.

—Company—Fictitious incorporation—Fraudulent conveyance.]—When a limited liability company has been regularly formed in accordance with the Ontario Companies Act for the purpose of taking over and carrying on the business of a trader who is insolvent, the conveyance of the assets of the latter to the company, though it may be open to attack on the ground that it is fraudulent and void as against creditors under the Statute of Elizabeth or the Assignments and Preferences Act, cannot be set aside at the instance of his creditors on the principle of the company being merely his alias or agent. *Salomon* v. *Salomon*, [1897] A.C. 22, applied. A creditor cannot take the benefit of the consideration for a conveyance, and at the same time attack the conveyance as fraudulent, and therefore, where creditors seized shares in a company allotted to their debtor in consideration of the conveyance by him of his assets to the company, it was held that they could not attack the conveyance: *Wood* v. *Reesor*, 22 Ont. App. 57, applied; *Rielle* v. *Reid*, 26 Ont. App. 54, reversing 28 Ont. R. 497 and C. A. Dig. (1897) 32.

—**Preferences—Payment of money—Cheque.**]—A trader in insolvent circumstances sold his stock-in-trade in good faith, and directed the purchaser to pay as part of the purchase money a debt due by the trader to his bankers, who held, as collateral security, a chattel mortgage on the stock-in-trade. The purchaser had an account with the same bankers, and gave to them a cheque on this account for the amount of their claim, there being funds at his credit to meet the cheque:—Held, that this was a payment of money to a creditor, and not a realization of a security, and that the bankers were not liable, in a creditor's action, to account for the amount received: *Davidson* v. *Fraser*, 23 Ont. App. 439, 28 S.C.R. 272, distinguished, on the ground that the cheque never was the property of, or under the control of, the insolvent; *Gordon* v. *Union Bank*, 26 Ont. App. 155.

—**Future rent—Preferential lien—Distress.**]—By the terms of a lease of shop premises, the rent was payable quarterly in advance. There was also a proviso in the lease that if the lessee should make any assignment for the benefit of creditors, the then current quarter's rent should immediately become due and payable, and the term forfeited and void, but the next succeeding current quarter's rent should also nevertheless be at once due and payable. Thirteen days after a quarter's rent in advance had become due, the lessee made an assignment for the benefit of his creditors:—Held, that the expression "arrears of rent due . . . for three months following the execution of such assignment" in s. 34 of the Landlord and Tenant Act, R.S.O. c. 170, means "arrears of rent becoming due during the three months following the execution of such assignment"; and the landlord was, therefore, apart from the proviso, in addition to the current quarter's rent, entitled to the quarter's rent payable in advance on the quarter day next after the date of the assignment:—Held, also, that the expression "the preferential lien of the landlord for rent" in s. 34 has the same meaning that it had under the Insolvent Acts; and the landlord was entitled to be paid the amount found due to him, as a preferred creditor, out of the proceeds of the goods upon the premises at the date of the assignment which were subject to distress, although there was no actual distress. *Lazier* v. *Henderson*, 29 Ont. R. 673.

— **Fraudulent preference — Transfer of overdue promissory notes—Payment by note.**]—Defendant was sued for the amount of an account for goods obtained from Spratt & Co., the account having been with others sold to plaintiff by the assignee in insolvency of Spratt & Co. Defendant shewed that before the assignment he had given Spratt & Co. a promissory note for the amount of the account and that such note was outstanding in the hands of a bank. It appeared, however, that before the note was given the sheriff had taken possession of Spratt & Co.'s business under an order for an attachment issued under the Queen's Bench Act, 1895, and that the note was in the hands of Spratt & Co. until after its maturity:—Held, that defendant could not have been compelled to pay the note to Spratt & Co., if they still held it, because they had no right to the money, that he was not liable upon it to the bank which took it after maturity, and that plaintiff was entitled to judgment; Held, also, that it was not necessary to make the holder of the note a party to the action. *Clay* v. *Gill*, 12 Man. R. 465.

— **Judgment debtor — Examination of — Assignment for benefit of creditors.**]

See DEBTOR AND CREDITOR, IX.

—**Landlord and tenant—Assignment of lease for benefit of creditors—Future Rent—Preference—Lien.**]—See LANDLORD AND TENANT, XII.

IV. CESSION DE BIENS.

— **Refusal to abandon—Intention to defraud—Capias—Art. 895, par. 3, C.C.P.**]—A. having duly served a demand for abandonment (*cession de biens*) on D., a trader, the latter, instead of stopping payments, met his creditors and proposed to compromise with them at eighty cents on the dollar. All the creditors except A. acceded to this proposition and granted D. eight days to have the composition deed signed, D. in the meantime putting all his assets in care of agents of the creditors:—Held, that A. having an absolute right to compel D. to abandon his property could have him arrested on *capias*, an intention to defraud not being necessary for arrest in such a case, and there had been a sufficient refusal on the part of D. to make the abandonment. *Agnew* v. *Dagenais*, 14 Que. S.C. 167.

— **Foreign debtor — Capias — Declaration.**]—A debtor domiciled in another province can, after a writ of *capias* issued against him has been maintained, make an abandonment of his property (*cession de biens*) by a declaration under oath to that effect accompanied by a statement before a notary public of the locality in which he lives. *Archer* v. *Douglas*, 14 Que. S.C. 408.

—**Joint curator—Solidarity.**]—Curators to judicial abandonments are administrators of the property thus abandoned. Their office is essentially that of an administrator.—A nomination of joint curators or administrators is legal and valid, and they constitute but one person in the eye of the law, so that a solidarity of liability exists between them as to all their duties and obligations as such. *Dombrowski* v. *Lefaivre*, 14 Que. S.C. 462.

—**Interdict—Habitual drunkenness—Wife curatrix—Demand of adandonment.**]—B., a trader, was interdicted for habitual drunkenness, and his wife was appointed curatrix. B. not meeting his obligations, a demand of abandonment (*cession de biens*) was made on his wife in her representative capacity:—Held, that this demand was sufficient, and

that it was not necessary that B. should be summoned to authorize his wife, the latter not being personally in the cause but only in her capacity as curatrix. *Renaud* v. *Hoffman*, 14 Que. S.C. 472.

—Demand of abandonment—Allegations—Arts. 853-856 C.C.P.]—A creditor making a demand of abandonment of property upon his debtor, under Arts. 853 *et seq.* of the Code of Procedure, is not obliged to allege in his proceedings that the debtor has ceased his payments. It is sufficient that the demand be made in the form prescribed by schedule O of the appendix to the Code, and that the claim be supported by oath and vouchers. *Neville* v. *Bode*, 14 Que. S.C. 530.

—Demand of abandonment—Affidavit—Amendment.]—A demand of abandonment made on one Alphonse Charlebois, therein described under the name of Charles Alphonse Charlebois, and the affidavit in support of the same may be amended by striking out the word "Charles" wherever it appears, the debtor suffering no prejudice by such description. *Taché* v. *Charlebois*, 2 Que. P.R. 47.

—Capias — Bail — Abandonment — Discharge of debtor—Surety.]—See CAPIAS.

—Contestation of statement—Conclusions—Exception—Inscription en droit.]

See PLEADING, VII.

V. CLAIMS AGAINST ESTATE.

—Sale of assets to creditor—Extinguishment of debt.]—An assignment of the assets of a partnership was duly made pursuant to the provisions of the Assignments and Preferences Act, and the assignee, with the approval of the creditors, sold and transferred the assets to a nominee of the plaintiffs and two other creditors of the firm in consideration of the payment to the other creditors of a composition, and subject to the claims of these three creditors. The purchaser covenanted with the assignee to settle the claims of these three creditors and to indemnify him therefrom.—Held, that the claims of these three creditors were thus made part of the purchase money, and were extinguished by the transfer of the assets. *Dueber* v. *Taggart*, 26 Ont. App. 295.

—Promissory note—Indorser—Incomplete instrument—Suretyship.]—The plaintiffs, being creditors of an incorporated company, accepted an offer made by the company's president, in a letter addressed to the plaintiffs to "personally guarantee payment" of the company's debt, upon an extension of time being given, and, in order to carry out the arrangement, promissory notes were made by the company payable to the order of the plaintiffs, and indorsed by the president, who made an assignment for the benefit of his creditors, under R.S.O. c. 147, before the maturity of three of the notes, in respect of which the plaintiffs sought to rank upon his estate in the hands of the defendant as assignee:—Held, following *Jenkins* v. *Coomber*, [1898] 2 Q.B. 168, that, upon the Statute of Frauds, no action could be maintained on the notes against the president, as to whom the instrument was incomplete. And although the correspondence and the notes taken together established an agreement of suretyship, notwithstanding the Statute of Frauds, yet proof could not be made upon such a contract when the notes guaranteed had not matured at the date of the assignment. *Grant* v. *West*, 23 Ont. App. 533, and *Purefoy* v. *Purefoy*, 1 Vern. 28 followed. *Clapperton* v. *Mutchmor*, 30 Ont. R. 595.

—Company—Dissolution—Attaching order.]

See COMPANY, V.

VI. COMPOSITION WITH CREDITORS.

—Transfer of insolvent's estate—Prejudice.—Where the creditors of an insolvent, after notice had been given to all of them, agreed to accept a composition on their claims, and, in order to carry out the composition, the debtor transferred his business and stock-in-trade to a third party who undertook to pay the creditors the amount of the composition, and the whole transaction was carried out honestly and in good faith, and to the knowledge of all the creditors, one of the creditors who had accepted the amount of the composition although he had not signed the compromise, could not afterwards have the transaction set aside unless he showed that it was prejudicial to the creditors. Such a transaction does not come within the terms of Art. 1035 C.C., it being a sale made with the consent of all the creditors who chose to attend the meetings, and in their interest. *Racine* v. *Singer*, 15 Que. S.C. 153.

VII. COSTS AGAINST CURATOR.

—Cessions de biens—Costs against curator—Recovery—Saisie-arrêt.]—See COSTS, XXIII. (*d*).

VIII. POSSESSION OF ASSETS.

—Seizure against insolvent—Opposition by curators.]—If the curator to an insolvent claims by way of opposition to a seizure under execution against the latter, property belonging to, but not included in the statement of, the insolvent, the seizing creditor cannot contest such opposition. *Turcotte* v. *Jacob*, 2 Que. P.R. 189.

IX. PRIVILEGE OF UNPAID VENDOR.

—Exercise of privilege—Time for exercise—Arts. 1998, 2000 C.C.—Construction.]

See SALE OF GOODS, X.

BANKS AND BANKING.

—Bankruptcy—Preferences—Payment of money—Cheque.]—*Gordon* v. *Union Bank*, 26 Ont. App. 155, *ante* under BANKRUPTCY AND INSOLVENCY, III.

—Reddition de comptes—Commercial matters—Arts. 566 et seq. C.C.P.]—The provisions of Arts. 566 *et seq.* C.C.P. concerning the *reddition de comptes* do not apply in commercial transactions or to the accounts which a bank should render to its customers.—A bank sued *en reddition de compte*, to compel it to render an account of certain trade balances or stock in incorporated companies assigned as collateral securities, is not obliged to file with the account its title to said stock. *Acer* v. *Bank of Toronto*, 14 Que. S.C. 187.

—Prescription—Damages for breach of commercial contract—Notice of arrival of goods—Duty of holder of bill of lading.]—An action of damages against a bank for not giving notice of the arrival of goods to the transferee of the bill of lading, being a claim based on a breach of a commercial contract, is not subject to the prescription of two years under Art. 2261 C.C.—A bank is not obliged by law to give notice of the arrival of the goods to the customer to whom it has endorsed and delivered the bill of lading, even if the bank itself received notice of the arrival. Where the importer of goods has the bill of lading in his possession, it is his duty to ascertain by what vessel the goods are coming, or to notify the agents of steamship companies of the marks on the goods, and ask that he be informed of their arrival. *Masson* v. *Merchants Bank of Canada*, 14 Que. S.C. 293.

—Discount—Transfer of both draft and account to bank.]—The Adams Shoe Company shipped goods to a Toronto house. Drafts were drawn for the price of such goods and discounted by the Merchants' Bank. As security for these advances, not only the title to the drafts was transferred to the bank, but also the claim against the Toronto house for the price of the goods shipped and the value of which the drafts represented:—Held, that there is no prohibition in the Banking Act against taking as security, for advances made by a bank, the transfer of a certain debt, and the same is permitted. Consequently the transactions above mentioned were valid and within the legal powers of the bank. *Merchants Bank* v. *Darveau*, 15 Que. S.C. 325.

—Société en commandite—Action against bank and director—Joint action—Separate defence.]

See COSTS, IX.

BARRISTER.

—Striking off rolls — Appeal from decision of Benchers—Reinstatement.]—B. a barrister and solicitor was suspended from practice for six months by the Benchers in 1894, for wrongfully retaining moneys of a client. On the expiration of the period of suspension, the client not having yet received her money from B., again complained to the Law Society, and on the hearing of the complaint in 1896, B. was disbarred and struck off the roll of solicitors:—Held, on appeal to the judges of the Supreme Court, as visitors of the Law Society: (1) That B. was not obliged to apply to the Benchers for reinstatement under s. 48 of the Legal Professions Act before bringing his appeal; (2) That the Benchers by suspending B. in 1894, had not exhausted their powers, but that they had power to disbar and strike B. off the rolls if they found that he was still wrongfully retaining his client's money, and not a fit and proper person to remain on the roll; (3) That the judges will not allow an appeal which would have the effect of reinstating a barrister or solicitor while still in default in respect to the transaction for which he was disbarred or struck off. *Re John Joseph Blake*, 6 B.C.R. 276.

And see SOLICITOR.

BEHRING SEA AWARD ACT.

—Illegal sealing—Unintentional offence—Nominal fine.]—Where the owner of a ship employs a competent master, and furnishes him with proper instruments, and the master uses due diligence, but for some unforeseen cause against which no precaution reasonably necessary to be taken can guard, is found sealing where sealing is forbidden, the Court may properly exercise its discretion and impose a nominal fine only. *The Queen* v. *The "Otto,"* 6 Can. Ex.C.R. 188.

BENEFIT SOCIETY.

— Claim for total disability — Non-payment of assessments after claim made — Forfeiture — Novation.] — Certificates of life insurance issued by a benefit society provided that in case of total disability, one-half the amount of the insurance should be payable to the insured. This was subject to the following conditions, among others: "(3) If the assured shall, at any time within thirty days after receiving due notice, fail to pay . . . the assessments . . . then . . . the association shall not be liable for payment of any sum whatever, and this certificate shall cease and determine." "(7) In every case when this certificate shall cease and determine . . . all payments thereon shall be forfeited to the association . . . ." A call was made by the association on the 1st March, 1897, payable on the 1st April, and notice given to T., who was then a member in good standing; on the 10th March he made a claim for total disability; and made default in paying the call on the 1st April. Further notice was given him by letter of the 9th April, by which he was to pay in fifteen days, but he failed to do so; and afterwards, upon a reference for the winding-up of the company, sought to prove a claim:—Held, that he was not entitled. B. made a claim for total disability on the 18th February, 1897, and put in the usual proofs, but no response was made by the association. He paid the call due on the 1st April, and no further call

was made till the 1st June:—Held, that his right of action vested before any subsequent call was made, and it was not essential for him to continue his membership after default arose on the part of the association to pay his claim; and therefore there was no bar to his establishing his claim upon the reference. Default of the association arose after sixty days from the furnishing by B. of proofs of total disability; for s. 42 of 55 V., c. 39 (O.) applied to the contract, there having been a novation, after the passing of that Act, of the original insurance contract, which was made in 1885. Another certificate issued by the association provided that in the event of the insured becoming totally and permanently disabled, and the determining of such disability by the medical director and board of directors of the association, there should be paid to the member, at the option of the board, if he should so request in writing at any time while the policy was in full force, upon the surrender to the association and the cancellation of the certificate, in full discharge and settlement of all claims under the contract, one-half of the amount of the insurance. Under this a claim for total disability was made after an order for the winding-up of the society:—Held, that the effect of the order was to destroy the functions of the directors and officers and practically to determine the contract; and as the conditions upon which the total disability benefit was to become payable were impossible of fulfilment, the claimant was not entitled to prove in the winding-up proceedings; but the denial of his claim was to be without prejudice to his proving for damages or otherwise on his policy. *Re Massachusetts Benefit Life Association*, 30 Ont. R. 309.

—Life insurance—Reapportionment by will—Revocation of Trust—Validity.]—By the rules of a benefit society the money secured by certificate was payable upon the death of a member to his widow and children, but in this case the member, by a codicil to his will, made shortly before his death, which occurred in October, 1886, directed that the moneys payable upon his certificate, which was issued in February, 1884, should be used by his widow to pay off the mortgage upon his farm. The money was paid to the widow, and she used it as directed, giving the plaintiff, a daughter of the deceased, the benefit of maintenance on the farm, until she married, at the age of nineteen. The plaintiff claimed her share, alleging a trust in her favour which could not be revoked by the codicil:—Held, following *Videan* v. *Westover*, 29 Ont. R. 1, that the provision made by the codicil was a reapportionment of the fund, which the deceased had power to make. *Racher* v. *Pew*, 30 Ont. R. 483.

—Insurance—Total disability.]—Notwithstanding that a by-law of the Aid and Assurance Assoc. of the Employees of the I.C.R. declares that to entitle him to an indemnity of $500, each member of class B. must "be entirely and permanently incapable of performing or superintending any work, trade, occupation or profession," one who has had a leg amputated has a right to the indemnity even if, for eight years after, he performed his duties as caretaker at a crossing if he has been dismissed from such position. The fact of being an illiterate man, a workman who has never learned a trade, would, under these circumstances, deprive the member, if not absolutely, at all events practically, of all means of gaining a living. It is not necessary that such an association should be incorporated in order that a judgment may be entered against it. *Aid and Assurance Association of Employees of the Intercolonial Railway* v. *Roberge*, 7 Que. Q.B. 500.

—By-law—Funds of society—Equality among beneficiaries.]—When a by-law of an Association for Mutual Relief provides that the widows of members shall be entitled to a sum of $150 when the capital of the Association shall have reached $1,200, all widows of members shall be entitled thereto from the time the capital shall have reached the said sum of $1,200, even if said capital should afterwards fall to a less amount. In the absence of an express intention in such bylaw, all widows of members are upon the same footing, and there is no preference in favour of one whose husband died first, over another whose husband died later. *L'Union St. Joseph* v. *Gagnon*, 8 Que. Q.B. 334.

—Agreement as to domestic forum—Validity of —By-law.]—The plaintiff, on joining a benefit society, expressly bound himself to be subject to the laws and by-laws governing the same. One of the by-laws declared that no member should be entitled to bring any action or other legal proceeding against the society until he had first exhausted the remedies by appeal provided by the rules of the organization:—Held, that such an agreement was not unconstitutional or void, and was not unreasonable on the part of members of a benefit society; and the plaintiff, therefore, was not entitled to bring an action of damages for unjustifiable suspension from membership, and expulsion from a meeting of the society, until he had first taken the appeal provided for by the rules. *Godin* v. *Independent Order of Foresters*, 14 Que. S.C. 12.

—Catholic order of Foresters—Local court—Incorporation—Tenant—Saisie-revendication.]—*Catholic Order of Foresters* v. *St. Martin*, 15 Que. S.C. 30.

—Relief of trustee—Disputed claims—Art. 1198 R.S.Q.]—A mutual benefit association, on the death of one of its members, may deposit the amount of his endowment certificate or policy at the office of the provincial treasurer, when such amount is claimed by different contending parties; and it is for the latter to get an order of judgment from the proper authority to withdraw the money. *Ex parte Hilliker*, 2 Que. P.R. 42.

See INSURANCE, III.

—Age of member—Estoppel—Res judicata.]—After an application for membership in a benevolent association had been accepted, a dispute arose as to the applicant's age, and an action was brought by him to compel the association to issue to him a certificate of membership. This action was settled, the association accepting an affidavit of the applicant's brother as proof of his age and thereupon issuing the certificate of membership. Subsequently the association brought this action asking for cancellation of the certificate on the ground that the applicant's age was not in fact that stated by his brother.—Held, that nothing less than clear proof by the association of the actual age of the applicant, and of fraud in procuring and making the affidavit, would suffice to undo the settlement and entitle the association to cancellation of the certificate. *Sons of Scotland Benevolent Association* v. *Faulkner*, 26 Ont. App. 253.

—By-laws—Will—Change in rules.]—In his application for membership in a benevolent society the applicant directed that the amount to which he should be entitled should be paid "subject to my will," and the certificate, issued in 1889, provided that at the death of beneficiary, if then in good standing, "his heirs and legal representatives shall be entitled to receive the amount collected upon an assessment not exceeding $3,000, and he now directs that in case of his death the said sum be paid subject to his will." The insured died on the 5th of January, 1897, having on the 12th September, 1896, made his will by which he directed his debts to be paid, and gave "all the rest and residue" of his estate to his wife, who survived him. At the time of the issue of the certificate the rules of the society provided that moneys payable under a beneficiary certificate should be paid to such person as the member while living might have directed, but there was no provision as to payment in the event of an invalid appointment or of want of appointment. In July, 1896, new rules were passed limiting the persons who could take as beneficiaries, and excluding expressly creditors and persons designated only by will.—Held, that the new rules did not affect certificates then existing and that the insured's executors were entitled to the amount (fixed at $1,500) for distribution among the insured's creditors. *Johnston* v. *Catholic Mutual Benevolent Association*, 24 Ont. App. 88 distinguished. *Fawcett* v. *Fawcett*, 26 Ont. App. 335.

—Gratuity certificate—Designation of persons to be benefited—By-laws.]—A gratuity certificate, issued by the Board of Trade of Toronto, to a member of the gratuity fund, for the payment, on his death, of a sum of money to his representatives, was made subject to the by-laws of the board, whereby the amount was payable to certain persons or class of persons, and in such proportions as might be designated by the member, in writing and under his signature, a blank being left in the certificate for such designation, but, unless he so designated, the amount was payable, where there was a wife and children, as was the case here, in the proportion of half to the wife and half to the children. No designation was made on the certificate by the member, and his will in no way referred to it.—Held, that under the terms of the certificate and by-laws the amount went to the widow and children to be divided between them and formed no part of his estate in the hands of his executors. *Babe* v. *Board of Trade of Toronto*, 30 Ont. R. 69.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. Accommodation.

—Action against maker—Warranty—Endorsement without consideration.]

See Action, XXVII.

II. Cheques.

—Consideration—Gambling debt—Holder in good faith—Presentation at bank.]—L. having lost while playing at cards borrowed $20 from his adversary giving him a cheque for the amount which he requested should not be presented at the bank before ten days. The cheque was transferred to the proprietor of the hotel in which the play took place, who was aware of the said request. Four or five days later the hotel keeper endorsed it over to D. who, fifteen days after, presented it for payment at the bank where there were no funds to meet it. The cheque was protested as against the maker and the two indorsers. In an action against the maker the latter pleaded: 1. That it was given for a gambling debt. 2. That it was not presented within a reasonable time. 3. That he had paid the amount to his original creditor before its presentation:—Held, that a third party, holder in good faith of a cheque given for a gambling debt, can recover the amount of it at law:—Held also, that presentation at the bank even a month after the cheque was given is not an obstacle to recovery against the maker. *Dion* v. *Lachance*, 14 Que. S.C. 77.

—Action on cheque—Presentment and protest.]—It is not necessary to allege, in an action based upon a cheque, that it was presented for payment within a reasonable time at the place where it was made payable, and was refused and protested. *Deserres* v. *Euard*, 2 Que. P.R. 124

III. Consideration.

—Cheque — Presumption of value received—Burden of proof.]—In the case of cheques and other negotiable instruments the presumption of law is that they are given for value received, though it be not so expressed in the instrument, and the burden of rebutting such presumption is on the party who denies that value was given. The evidence adduced to rebut the presumption of value must be clear and convincing; mere improbability of the existence of a debt is not sufficient. *Larraway* v. *Harvey*, 14 Que. S.C. 97.

—Promissory note—Composition—Natural obligation.]—The defendant effected a composition with his creditors, including the plaintiff, and about a year afterwards, wishing to obtain further credit from the plaintiff, he voluntarily gave him a note for $100, for which he received no new consideration:—Held, that the natural obligation still existing on the part of the defendant to pay the balance of the old debt was a good and valid consideration for the note, and the amount thereof might be recovered in an action at law. *Bédard* v. *Chaput*, 15 Que. S.C. 572.

—Note given by insolvent to procure signature to composition deed.]—The plaintiff who was the only resident member of a firm doing business in Canada, had a right to sign, and did sign, defendant's composition deed in the name of his firm. In an action brought by the plaintiff, subsequently, to recover payment of two promissory notes made by defendant, it was shewn that the consideration of such notes was that plaintiff should secure the signature of his own firm and that of another firm, to the composition deed, in order that it might be possible to obtain the signatures of other creditors:—Held, that the consideration was illegal, and plaintiff's action, in consequence, could not be maintained. *Fisher* v. *Genser*, 15 Que. S.C. 605.

—Note for money lent — Separate debt—Prescription.]—The debt arising from money lent and signified by a promissory note made at the time of the loan has an existence separate and distinct from the note itself. The consideration for the note does not form with it one and the same contract but can be separated from it. Thus, the note may be prescribed in five years while the sum lent, which forms the consideration, can only be prescribed by a longer period. *Bouchard* v. *Bhèrer*, 5 Rev. de Jur. 263.

—Husband and wife—Obligation of husband—Art. 1932 C.C.]—In an action on a note made by a wife separated as to property and indorsed by her husband, the latter cannot plead the nullity of his obligation if he otherwise admits having received consideration for the note. *O'Farrell* v. *Dutrizac*, 2 Que. P.R. 61.

—Release from imprisonment.]—Release from imprisonment in default of payment of a fine imposed on conviction for an offence against The Fires Prevention Act, R.S.M., c. 60, may be a good consideration for a promissory note to secure payment of the fine and costs. *Proctor* v. *Parker*, 12 Man. R. 528.

IV. Defences to Actions.

—Consideration in part illegal—Stifling prosecution.]—The promissory notes given on an illegal agreement, of which the plaintiff had knowledge, the whole agreement being based upon the understanding that one of the defendants was to be discharged from custody, are illegal and void. *Leggatt* v. *Brown*, 30 Ont. R. 225, affirming 29 Ont. R. 530 and C. A. Dig. (1898) 99.

—Fraudulent assignment—Transfer of overdue promissory note.]—Defendant was sued for the amount of an account for goods obtained from Spratt & Co., the account having been with others sold to plaintiff by the assignee in insolvency of Spratt & Co. Defendant shewed that before the assignment he had given Spratt & Co. a promissory note for the amount of the account, and that such note was outstanding in the hands of a bank. It appeared, however, that before the note was given the sheriff had taken possession of Spratt & Co.'s business under an order for an attachment issued under The Queen's Bench Act, 1895, and that the note was in the hands of Spratt & Co. until after its maturity:—Held, that defendant could not have been compelled to pay the note to Spratt & Co., if they still held it, because they had no right to the money, that he was not liable upon it to the bank which took it after maturity, and that plaintiff was entitled to judgment. Held, also, that it was not necessary to make the holder of the note a party to the action. *Bertrand* v. *Hooker*, 10 Man. R. 445, not followed. *Clay* v. *Gill*, 12 Man. R. 465.

—Insertion of rate of interest—Authorization of alteration.]—Where a promissory note is signed or endorsed, leaving a blank space for the rate of interest in an existing clause providing for interest, any party in possession of the note has, under s. 20 of the Bills of Exchange Act, 1890, made applicable to promissory notes by s. 88, *prima facie* authority to fill in any rate of interest; but if the note when signed and endorsed had no clause providing for interest, the addition of such a clause, requiring interest, is an alteration not contemplated when the note was made or endorsed, and avoids it:—Held, on the facts, that the note in question, when made and endorsed, contained an interest clause leaving a blank for the rate, and that

the plaintiffs were entitled to recover the amount of the note with interest at eighteen per cent. as charged. The evidence of a handwriting expert upon the question of whether the interest clause was written in before, at the time of, or after the signature and endorsement of the note was admitted. *British Columbia Land and Investment Agency* v. *Ellis*, 6 B.C.R. 80.

—Husband and wife—Joint note—Validity—Separate estate—Foreign law.]

See PRACTICE AND PROCEDURE, XXXVIII.

V. FORM.

—Municipal corporation—Warrant drawn by Police Committee.]—A warrant issued by the Police Committee of the City Council, addressed to the city treasurer, is not a bill of exchange, though made payable to order. *Charlebois* v. *City of Montreal*, 15 Que. S.C. 96.

— Written order containing condition.] — A written order to a person to pay so much per month out of the salary of the drawer, so long as he shall be indebted to the person in whose favour the order is given, being conditional, is not a bill of exchange. *Angers* v. *Dillon*, 15 Que. S.C. 435.

—Conditions attached—Special agreement.]—A writing in the form of a promissory note, which had the conditions attached that it was to become payable forthwith if promisor disposed of his land or personal property, and that the title of the goods, for which the note was given as security, should remain in the payee until the note was paid and that the goods in the meantime were only on hire, etc., was held to be a special agreement and not a promissory note. *Prescott* v. *Garland*, 34 N.B.R. 291.

—Lien note.]—The instruments sued on in these cases contained the usual provisions of a promissory note with additional provisions to the effect that the title, ownership and property for which they were given should not pass from the payees until payment in full, that if the notes were not paid at maturity the vendors might take possession of the machinery for which they were given and sell the same at public or private sale, the proceeds less the expenses to be applied on the notes, and that such action should be without prejudice to the right of the vendors to forthwith collect the balance remaining unpaid:—Held, that the instruments could not be regarded as negotiable promissory notes, because the added provisions were matters entirely unwarranted by s.s. 3 of s. 82 of The Bills of Exchange Act 1890, as they could in no sense be treated as merely "a pledge of collateral security with authority to sell or dispose thereof;" and the statute, having set out certain additions that might be made to the simple promise to pay, impliedly excluded others. *Kirkwood* v. *Smith* [1896], 1 Q.B. 582, followed; *Merchants Bank* v. *Dunlop*, 9 Man. R. 623, not followed; *Dominion Bank* v. *Wiggins*, 21 Ont. App. 275, and *Prescott* v. *Garland*, 34 N.B.R. 291, considered; *Bank of Hamilton* v. *Gillies*, 12 Man. R. 495.

—Equitable assignment—Order to pay—Intent to assign a particular fund.]—The plaintiff sued as assignee of one Stewart of an order in favour of Stewart from one Bell on the defendants for $96.45, which order was in the following words: "Shakespeare, Sept. 29. $96,45. The Trustees of SS. No. 2, North Easthope: Please pay Mr. P. Stewart the sum of ninety-six $^{45}_{100}$ Dollars, and charge to my account. J. N. Bell." This document was given to Stewart enclosed in a letter to one of the trustees, which letter said, inter alia, "will you kindly accept the enclosed orders, and we can deduct it from my salary to-morrow when we settle." This amount was in fact coming to Bell on account of salary, and only on that account. Notwithstanding notice of the above document and letter the trustees paid the full amount of salary to Bell, on the pretence or belief that the absence of the year in the first mentioned document, absolved them from liability to Stewart:—Held, that the document was a bill of exchange; and that together with the accompanying letter it constituted an equitable assignment. *Farrell* v. *Trustees School Section No. 2, North Easthope*, 35 C.L.J. 395.

VI. INCOMPLETE INSTRUMENT.

—Bankruptcy and insolvency—Proof of claim—Promissory note—Indorser.]

See BANKRUPTCY AND INSOLVENCY, V.

VII. INFANT'S NOTE.

—Tutor—Promissory note signed by—Effect of, as regards minors.]—On a promissory note signed by the promissor as tutor to minors, an action will not lie against a child who had attained the age of majority before the note was made. A tutor to minors has no power to create an obligation binding on them, by the mere acknowledgment of an indebtedness on their part made by him, nor by the promise made by him to pay the amount of such indebtedness. Therefore a promissory note signed by a person as tutor to minors creates no right of action in favour of the holder against the tutor in his capacity as such. *Nash* v. *Jodoin*, 15 Que. S.C. 70.

VIII. INTEREST.

—Claim for interest on Bill of Exchange—Liquidated damages.]

See DEBTOR AND CREDITOR, II.

IX. JOINT AND SEVERAL LIABILITY.

—Promissory note—Solidarité.]—A promissory note is a commercial instrument (*acte de commerce*) and the obligation of the makers or signers is joint and several (*solidaire*). *Crépeau* v. *Beauchesne*, 14 Que. S.C. 495.

X. LOST NOTE.

—Indemnity—Costs—Reference to the Master.]—In an action on a lost promissory note, when

the loss is pleaded, the plaintiff should, in general, tender the defendant a proper bond of indemnity with a sufficient surety or sureties before applying to set aside the plea under s. 69 of the Bills of Exchange Act, 1890, in order to avoid paying the costs of this defence, and of the application. Although the words of the statute are that an indemnity "to the satisfaction of the court or a judge" is to be given, the security may be left to the Master to settle. *Schoolbred* v. *Clarke*, 17 S.C.R. 265, followed. *Orton* v. *Brett*, 12 Man. R. 448.

XI. Note by Marksman.

—Maker and witness unable to write.]—A promissory note written out by the creditor and signed by the debtor with a mark in form of a cross, in presence of a witness who was also unable to write and made the mark of a cross, is valid provided that the holder proves on oath that the note was signed as above stated. *Remillard* v. *Morsau*, 15 Que. S.C. 622.

XII. Parties.

—Note of Assignee—Signature as Agent.]—An assignee of a partnership, conducting the business under a trust deed for the benefit of the creditors, gave promissory notes to the plaintiffs for goods supplied to him in connection therewith, and signed them in the firm name, followed by his own, with the word "assignee" added. The deed gave him no authority to make notes or accept bills on behalf of the firm, and the plaintiffs had previously refused to draw on the latter, requiring his own acceptance:—Held, that under these circumstances, and having regard to section 26 of the Bills of Exchange Act, he was personally liable on the notes. *Boyd* v. *Mortimer*, 30 Ont. R. 290.

XIII. Protest.

—Presentment—Insolvency of parties.—In an action on a promissory note against the maker and the indorser, where it is alleged that both are insolvent, the indorser cannot demur on the ground that no presentment nor protest of the said note is alleged. *Banque Nationale* v. *Martel*, 2 Que. P.R. 35.

XIV. Severance of Action.

—Several notes by same maker—Art. 87 C.C.P.]—The holder of several promissory notes due by the same maker is not obliged to unite the amounts when he sues at one time for payment, and he may without violating Art. 76 C.C.P. which prohibits the division of a debt due in a demand for recovery by several actions, proceed on the same day against the debtor by as many distinct actions as there are notes. *DeMartigny* v. *Ouellette*, 15 Que. S.C. 249.

BILLS OF LADING.

See Shipping, I.

BILLS OF SALE AND CHATTEL MORTGAGES.

I. Affidavit of Bona Fides.

—Affidavit of Bona Fides—Variation from Statutory Form—Indorser—Payment of notes by Mortgagee—Change in form of security.]—The affidavit of *bona fides* made by the mortgagee in respect of a chattel mortgage given to secure him against liability in respect of his indorsement of certain promissory notes for the mortgagor, contained the expression, "and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage," instead of the statutory words, "and truly states the extent of the liability intended to be created and covered by such mortgage." It also contained this clause: "And for the express purpose of securing me, the said mortgagee therein named, against the payment of the amount of such notes indorsing liability for the said mortgagor:" instead of the words, "and for the express purpose of securing the mortgagee against the payment of the amount of his liability for the mortgagor:—Held, that the mortgage was not void as against creditors by reason of these variations from the statutory form. *Boldrick* v. *Ryan*, 17 Ont. App. 253, distinguished. The mortgagee, having paid the notes during the currency of the mortgage, before the expiration of a year took and filled a new mortgage upon the same goods for the amount paid by him and interest, changing the form of the instrument so as to make it appropriate to an actual advance of money, but not reciting the prior mortgage or the payment. Within sixty days of this, the mortgagor made an assignment for the benefit of creditors:—Held, that executions in the sheriff's hands before the second mortgage was filed, but subsequent to the prior mortgage, did not gain priority over the second; and the statutory presumption that the latter was made with intent to prefer was rebutted by the circumstances. *Rogers* v. *Carroll*, 30 Ont. R. 328

II. Change of Possession.

—Unascertained or future goods—Description—Affidavit of bona fides.]—The defendant in February, 1898, while visiting the camp of one Ryan, who was then engaged in cutting cordwood on a certain limit, entered into a verbal cortract with Ryan by which the latter was to deliver about 85 cords of wood

on the station grounds at Molson, on the C.P.R., at a point indicated by defendant, in payment of a debt. During the following month Ryan hauled out and piled about 85 cords of the wood in the place indicated, and notified the defendant thereof. He also hauled out and piled in different parts of the same grounds about 1,500 cords besides. The plaintiff, to whom also Ryan was indebted, obtained from him a chattel mortgage, dated 7th April, 1898, covering the wood delivered for defendant and a large quantity of other wood piled at the same station. This mortgage was registered in the proper office on the 14th of the same month. A few days after, the defendant went to Molson, accepted the 85 cords in question, and had it shipped away, when the plaintiff replevied all he could find of it. Held, (Dubuc, J., dissenting) that the facts brought the case within rule 5 of s. 18 of The Sale of Goods Act (Man.), 1896, and that there had been a contract for the sale of unascertained or future goods by description, and a sufficient appropriation afterwards made by the vendor of goods of that description and in a deliverable shape, with the assent of the buyer to pass the property as soon as delivered at the station grounds, and that such was the result notwithstanding the value exceeded $50, as s. 4 of the Act only provides that such a contract shall not be enforceable by action and replaces s. 17 of the Statute of Frauds. Held, that acceptance of the wood by defendant sufficient to satisfy s. 33 of The Sale of Goods Act (Man.), was not a condition precedent to the passing of the property. Held, (Killam, J., dissenting), that the facts, although showing an immediate delivery by Ryan to the defendant, within the meaning of s. 2 of The Bills of Sale Act, R.S.M., c. 10, did not warrant the conclusion that there had been the actual change of possession necessary to satisfy that statute, which must be such a change as is openly and reasonably sufficient to afford public notice thereof, as expressly provided in the corresponding Ontario Act, and therefore that the plaintiff's chattel mortgage was entitled to prevail over defendant's title. Held, also, per Dubuc, J., that an error in the statement of the indebtedness in the affidavit of *bona fides* sworn to by the plaintiff and attached to the chattel mortgage, was not, in the absence of fraud, fatal to its validity. *Bernhart* v. *McCutcheon*, 12 Man. R. 394.

III. Contract for Bill of Sale.

—Specific performance.]—Specific performance will be decreed of an agreement to give a bill of sale upon ascertained furniture sold and delivered upon credit in reliance upon such agreement. *Jones* v. *Brewer*, 1 N.B. Eq. 630.

IV. Description.

—Location of goods—Erroneous description.]—Goods intended to be included in a chattel mortgage were described therein as those mentioned in the schedule, the property of the mortgagors, situate upon the premises on the north-east corner of certain streets in a township. The schedule contained a list of the goods, which consisted of household furniture, each article being described, and the articles in each room set out under a heading describing the room. The mortgage contained a covenant that if the mortgagors should part with the possession of the goods, the mortgagee was entitled to take possession:—Held, that, having regard to these provisions, it was to be taken that the mortgaged goods were the property of the mortgagors, in their possession, and contained in the building described in the mortgage; that that building was the dwelling-house of the mortgagors; and that the goods were the household furniture in use by the mortgagors. And, although, when the mortgage was executed, the goods were in the house at the north-west corner, and not the north-east corner, the mortgage was not void; the erroneous part of the description might be rejected, and the statement that they were contained in the mortgagors' dwelling-house would remain. *Hovey* v. *Whiting*, 14 S.C.R. at p. 559, referred to; *Accountant of the Supreme Court* v. *Marcon*, 30 Ont. R. 135.

V. Equity of Redemption.

—Seizure of equity and sale by sheriff—Sale of goods—Conversion.]—See Replevin.

VI. Execution.

—Time of actual sale—Date of execution of bill of sale.]—The date in a bill of sale is immaterial if it is registered after its actual execution within the time required by R.S.O., c. 148, "The Bills of Sale and Chattel Mortgage Act." On a *bona fide* sale of goods, it is not necessary that the bill of sale shall be completed by execution of the instrument in any particular time after the actual sale. *McDonald* v. *Gaunt*, 30 Ont. R. 398.

VII. Impeachment.

—Fraudulent bill of sale—Husband and wife.]—C. in 1896 gave his wife $600.00, which she kept in the house, and he shortly after commenced to receive it back in small portions and continued to do so until he had received it all. In March, 1898, according to the evidence of both, she demanded some settlement, and he agreed to give her a bill of sale of the household furniture, but the transaction was not carried out until June, after he had been sued for the price of the furniture:—Held, that there was no legal obligation binding upon the husband to repay the $600.00, and that the bill of sale must be treated in the same way as if the gift had been made to the wife at the time of the execution of the bill of sale, and was therefore void. *Cordingley* v. *MacArthur*, 6 B.C.R. 527.

—**Affidavit of bona fides—Errors in.**]

See sub-heading II. (CHANGE OF POSSESSION).

VIII. MORTGAGEE BIDDING IN.

—**Bidding in at sale by mortgagee—Accounts—Goodwill.**]—Mortgagees put up stock-in-trade of a butcher business for sale under their mortgages, bid it in and took possession with the assent of the mortgagor, paid off arrears of wages and rent, and carried on the business with the mortgagor in their employ for some months. In an action by the mortgagor to avoid the sale, held by Drake, J., That it was void and the property could be redeemed; that in the taking of accounts mortgagor could not be charged with arrears of wages paid by the mortgagees, this payment not having been expressly assented to by the mortgagor.—Held, further, on appeal from judgment of Drake, J. (on motion to vary the Registrar's certificate): That a sum stated by the mortgagees to be the value of the goodwill for the purposes of an amalgamation scheme between them and another company, could not be charged against them in the accounts. *Van Volkenberg* v. *Western Canada Ranching Co.*, 6 B.C.R. 284.

IX. SUBSEQUENT PURCHASER.

—**Non-compliance with statute.**]—A purchaser of goods who neglects to comply with s. 6 of the Bills of Sale Act cannot invoke its provisions as against a subsequent purchaser in good faith, and the latter, even though he also has not complied with the Act, obtains priority. *Winn* v. *Snider*, 26 Ont. App. 384.

BOARDING HOUSE.

—**Board and lodging—Prescription—Art. 2262 C.C.**]—See LIMITATION OF ACTIONS, VI.

BOND.

—**Appeal bond—Defect in form.**]

See APPEAL, VII.

—**Postmaster's bond — Laches of government officials—Discharge of surety.**]

See PRINCIPAL AND SURETY, II.

BORNAGE.

—**Concession line—Survey—Evidence.**]—In an action *en bornage* between E., the owner of lots 7, 8 and 9, in the tenth concession of the Township of Eardley, Que., and S., the owner of like numbered lots, in the ninth concession, the question to be decided was the location of the line between the two concessions, E. claiming that it should be one straight line, to be traced from the south-easterly angle of lot 14, in the tenth concession easterly on a course S. 87° 30′ E. to the town line between Eardley and Hull, while S. claimed that as to the lots in question it was about a quarter of a mile north of where the straight line would place it. A survey of part of the line was made in 1828, and the remainder in 1850, and in 1892 the whole linewas surveyed again, and the result was held by the Court below to establish it in accordance with the claim of E. In 1867 there was a private survey, which established the line further north as claimed by S., who contended that it, and not the survey in 1892, was a retracing of the original line:—Held, that the original surveys were made in accordance with the instructions to the surveyors and established the straight line as the true concession line; that the survey in 1892 was the only one which retraced the original line in an efficient and legal manner; and that the evidence failed to support the contention that it was retraced in 1867, such contention depending on assumptions as to the manner in which the original surveys were made which the Courts would not be justified in acting upon. *Spratt* v. *E. B. Eddy Co.*, 29 S.C.R. 411.

—**Surveyor—Deposit of fees.**]—In an action *en bornage*, when the parties agree to appoint a surveyor, each of them must deposit with the prothonotary a moiety of the amount demanded by such surveyor to obtain his report. *Sicard* v. *McKenzie*, 2 Que. P.R. 140.

BOUNDARIES.

—**Final judgment—Line between adjoining lots of land — Encroachment — Common error.**]—Where surveyors were appointed to fix boundaries, and their report was received, but the Court, before adjudicating on the merits ordered the surveyors to place boundary marks, such judgment is a final judgment not susceptible of being revoked by the same Court in so far as it pronounced on the *fond* of the cause and determined the line of separation between the properties; but in so far as it ordered the actual operation of placing boundary marks, it was merely preparatory to the final judgment, and none of the parties having asked for such actual placing of marks, and no marks having been placed, this part of the judgment might be revoked by the same Court.—Where a lot of land has been sold according to a line which proves to be erroneous, and encroaches on an adjoining lot, the owner of the latter, whose *auteur* participated in the error, is not entitled to demand the demolition of a wall erected by his neighbour on the line agreed to in error, without offering compensation for the cost of the wall; and failing such offer, he is only entitled to demand compensation for the land taken. *Barry* v. *Rodier*, 14 Que. S.C. 372.

—**Of school sections.**]—See SCHOOLS.

BROKER.

—Stock exchange custom—Sale of shares—Marginal transfer.]—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*, 29 S.C.R. 54.

—Transactions in stocks—Evidence.]—Where it is not proved that the shares, in respect of which brokers claim a balance due for commission, advances and interest, were ever purchased by them for the defendant or were ever offered to him, but on the contract it appears that the shares always remained in the possession of plaintiffs' New York agent, and were sold without any authority from defendant, the action will not be maintained.—The production by the brokers' bookkeeper of entries in a press letter copy book, said to be copies of the bought and sold contract notes, relating to the purchase and sale of shares, the originals of which were sent to the customer, defendant, does not make proof of such purchase, where the defendant has not been asked to produce the originals of the contract notes, or whether he had ever received the originals, and there is no evidence that he ever did receive them.—Payments made by a customer to the broker on a current account do not constitute an acknowledgement of a particular charge relating to a transaction posterior to such payments. *Forget* v. *Baxter*, 7 Que. Q.B. 530, affirming 13 Que. S.C. 104.

BUILDING AND JURY FUND.

—Judicial tax—Class—Collocations.]—The tax of 1% for the Building and Jury Fund is imposed upon the proceeds of a judicial sale and not upon the collocations themselves. It should be collocated according to the second class of judicial fees. It cannot be taken from the collocations appearing in the report of distribution, and the sheriff who has omitted to give it its class has no right to deduct it from the collocations of the creditors who are entitled to the amount of their respective collocations. *Re Bresse and Permanent Construction Society*, 14 Que. S.C. 136.

BY-LAW.

—Benefit society—Validity of by-law—Remedy for grievance—Suspension of action.]

See Benefit Society.

See Municipal Corporations, III.

CANADA TEMPERANCE ACT.

I. Conviction.

—Appearance of defendant by counsel under protest—Waiving defect in service—"Costs of commitment."]—Defendant was summoned to appear before the Stipendiary Magistrate of the town of P. to answer a charge of having unlawfully kept for sale intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act. On the return day of the summons counsel for defendant appeared and took objection that the service was insufficient, the constable by whom it was effected not being a constable for the Municipality of the County of P. The constable was called and was cross-examined, under protest, by defendant's counsel, who then retired, and the magistrate, after hearing evidence as to the commission of the offence charged, adjourned the case from the 21st January, 1899, until the 27th of the same month, and on that date, defendant not appearing either personally or by counsel, convicted him, and adjudged that he pay the sum of $50, and also that he pay the informant his costs amounting to $4.10, such sums if not paid forthwith to be levied by distress of the goods and chattels of defendant, and, in default of distress, that defendant be imprisoned for the space of 60 days, unless such sums and the costs and charges of said distress and of the commitment, and of conveying defendant to jail, were sooner paid.—Held, refusing a writ of *certiorari*—(1) That the appearance by counsel cured the defect, if any, in the service. (2) That the fact of defendant's solicitor having left the court did not deprive the magistrate of the right to adjourn. (3) That the magistrate having adjourned, had the power on the day to which the case was adjourned to convict in the absence of defendant. (4) That the use of the words

"costs of commitment" in the conviction, while irregular, should be treated as mere surplusage. (5) That if an attempt were made to enforce the warrant of commitment in respect to the costs of commitment, defendant's remedy would be to tender the amount due. *The Queen* v. *Doherty*, 32 N.S.R. 235.

—Form of conviction—Cr. Code, 872 (b).]—A conviction for an offence against the Canada Temperance Act, adjudging a fine and costs to be paid forthwith, and, in default thereof, imprisonment, is proper under s. 872 (b) of the Criminal Code, without awarding distress, and in default of distress then imprisonment. *Ex parte Casson*, 34 N.B.R. 331, 2 Can. Cr. Cas. 483.

—Jurisdiction of magistrate—Form of conviction Third offence.]—See CRIMINAL LAW, XX.

II. INFORMATION.

—Information not laid before two justices—Facts to be shewn on face of information—Estoppel.]—On the 14th October, 1898, defendant was convicted before two justices of the peace for the county of H. of an offence against the provisions of the Canada Temperance Act. On the 15th of November of the same year, an order was granted for a writ of *certiorari* to remove into this court the conviction, and all things touching the same, on the ground that the information was bad on its face, not having been laid before two justices, but before one only, in the absence of the other justice named in the summons, who was one of those that made the conviction.—Held, dismissing the appeal taken by the inspector, that the two justices must be present when the information is laid, and must concur in directing the issue of the summons, that being a judicial act; also, that the information should shew on its face that it was laid before the two justices, and their names should appear therein, and the summons should follow the information. *The Queen* v. *Brown*, 23 N.S.R. 21, followed.—Held, also, that the words "if such prosecution is brought," in s. 105 of the act, as amended by Dom. Acts of 1888, c. 34, can apply only to the laying of the information or the issuing of the summons.—Held, per Meagher, J., that defendant was estopped from taking the objection to the jurisdiction of the justices by whom the conviction was made, by having appeared to the summons, and gone on with the trial, and examination and cross-examination of witnesses, and by failing to take any objection to the jurisdiction until after the prosecutor had rested his case. *The Queen* v. *Ettinger*, 32 N.S.R. 176.

—Information not laid before two justices.]—Where a prosecution is brought before two justices under the Canada Temperance Act, the information must be laid before two justices, the Criminal Code, s. 842, not having altered the law under which *Ex parte Sprague*, 31 N.B.R. 236 was decided. *Ex parte White*, 34 N.B.R. 333, 3 Can. Cr. Cas. 94.

III. MILITARY CANTEEN.

—Canada Militia Act, 1886—Queen's Regulations.]—An infantry school corps has the right to establish and maintain a canteen to be conducted in accordance with the Queen's Regulations; and, inasmuch as the active militia is subject to these orders and regulations, every officer and man of the militia, from the time of being called out for active service, and also during the period of annual drill or training, has an equal right with the members of the infantry school corps, to purchase ale and other articles for sale at the canteen, even in a place where the Canada Temperance Act is in force. *Ex parte Patchell*, 34 N.B.R. 258, 3 Can. Cr. Cas. 75.

IV. PROOF OF OFFENCE.

—Incorporated company—Manager—Sale by Clerk.]—The president of an incorporated company, who hired the clerks and had the entire management of the business, may be convicted for selling liquor, contrary to the provisions of the second part of the Canada Temperance Act, where the sale had been made by a clerk under general directions received by him from the president. *Ex parte Baird*, 34 N.B.R. 213, 3 Can. Cr. Cas. 65.

CAPIAS.

—Secretion of effects by debtor in another province—Lex fori.]—The rules governing the use of the writ of *capias ad respondendum* are those of the place where the arrest under the writ is made; they are those of the *lex fori*, and not those of *lex loci*. Therefore, the fact that the alleged secretion of effects by a debtor arrested under a writ of *capias* in the Province of Quebec, took place in another province of the Dominion of Canada, is not a bar to the exercise by the creditor of his remedy by way of *capias* in Quebec, if the debtor be found within the jurisdiction.—The mere knowledge by the creditor issuing the *capias*, that a criminal proceeding had been issued by another creditor, and the fact that the former had contributed to pay the expenses of such criminal proceeding, are not sufficient to rebut the presumption of good faith, so as to deprive the said creditor of the remedy by *capias* against his debtor while the latter is within the jurisdiction. *Gault Co.* v. *Cloutier*, 7 Que. Q.B. 546.

—Discharge of surety—Principal relieved from his obligation.]—Where a person was arrested under a writ of *capias ad respondendum*, and the present defendant gave bail to the sheriff, and subsequently the debtor made an abandonment of his property for the benefit of his creditors and gave due notice thereof, and his *bilan* having remained uncontested during the four months following the notices, he was relieved from the effect of the *capias*, his surety on the bail bond was also discharged from his obligation. *McClary Manfg. Co.* v. *Morin*, 14 Que. S.C. 423.

—Evidence of intention to defraud—Allegation of criminal acts.]—The fact that a debtor spoke to several persons of going to a foreign country to look after his interest in a certain succession, does not shew intention to abscond with intent to defraud, and does not justify the issue of a writ of *capias*. Allegations of fraudulent appropriation of moneys, which would support a criminal charge, cannot be used to justify the issue of a writ of *capias*, the creditor not being entitled to substitute the latter proceeding for the remedy by criminal process. *Nelson* v. *Lippe*, 14 Que. S.C. 437.

—Demand of abandonment (Cession de biens)—Refusal—Intention to defraud.]

See BANKRUPTCY AND INSOLVENCY, IV.

And see DEBTOR AND CREDITOR, II.

—False allegations—Contestation.]

See STATUTE, I.

" PRACTICE AND PROCEDURE, X.

CARRIERS.

—Bill of lading—Notice of arrival of goods—Breach of contract—Damages—Prescription—Art. 2261 C.C.]—See BANKS AND BANKING.

CAVEAT.

See MANITOBA REAL PROPERTY ACT.

CERTIORARI.

—Conviction—Art. 4035c. R.S.Q.]—The finding of facts in a conviction under Art. 4035c. R.S.Q. cannot be reviewed on certiorari. *Re Girard*, 14 Que. S.C. 237.

—When to be resorted to.]—The writ of certiorari is a prerogation writ which, notwithstanding any statutory provision to the contrary, may be resorted to to control the action of an inferior jurisdiction, and restrain it within the limits prescribed by law, whenever there has been a failure, absence or excess of jurisdiction, and especially whenever an unauthorized penalty has been imposed. *Mathieu* v. *Wentworth*, 15 Que. S.C. 504.

—Application for writ—Security for costs.]

See COSTS, XVI.

" PRACTICE AND PROCEDURE, XI.

CESSION DE BIENS.

—Personal injuries—Judgment for damages—Arrest in execution—Order for arrest—Previous abandonment—Art. 846 C.C.P.]

See DEBTOR AND CREDITOR, II.

—Judgment—Abandonment after—Contrainte par corps—Prevention of arrest.]

See JUDGMENT, VIII.

—Demand—Unfounded contestation—Seizure before judgment—Art. 931 C.C.P.]

See SAISIE-ARRÊT.

" BANKRUPTCY AND INSOLVENCY, IV.

CHAMPERTY.

—Solicitor and client—Agreement for compensation.]—An agreement by a solicitor to prosecute a claim to judgment at his own expense in consideration of his receiving one-fourth of the amount which should be recovered is champertous and void. *O'Connor* v. *Gemmill*, 26 Ont. App. 27, affirming, *quoad hoc*, 29 Ont. R. 47 and C.A. Dig. (1898) 433.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CHEQUE.

—Presumption of Value—Burden of Proof.]

See EVIDENCE, VIII.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

CHOSE IN ACTION.

—Equitable assignment—Subsequent written assignment—Priority on fund.]—A present appropriation, by an order, of a particular fund not yet realized operates as an equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect in equity. A married woman, as agent of her husband who was indebted for costs to a firm of solicitors instructed one of the firm, after its dissolution, to sell certain land and retain the costs out of the proceeds as a first charge. The land was sold by a new firm, in which one of the old firm was a member:—Held, that the wife's instructions amounted to an equitable assignment, and that the solicitors were entitled to the proceeds of the sale as against an assignee under a written assignment of the same, subsequently made; Held, also, that the transaction was not a contract concerning land, but an agreement to apply the proceeds of land when sold. *Heyd* v. *Millar*, 29 Ont. R. 735.

—N.S. Collections Act—Teacher in common schools—Salary—Chose in action—Assignment.]

See DEBTOR AND CREDITOR, VI.

CHOSE JUGÉE.

See RES JUDICATA.

CIRCUIT COURT.

—Husband and wife—Séparés de biens—Defamation — Joint demand — Jurisdiction — Art. 54 C.C.P.]

See PRACTICE AND PROCEDURE, XXVII.

COLLOCATION.

See DISTRIBUTION.

COMMERCIAL TRANSACTION.

—Promissory note—Solidarité—Presumption.]—A promissory note is a commercial instrument and the obligation of the makers is joint and several (solidaire). By the terms of Art. 1105 C.C. *solidarité* is not presumed, but this rule does not apply to commercial transactions in which the obligation is always presumed to be *solidaire*. *Crépeau* v. *Beauchesne*, 14 Que. S.C. 495.

—Reddition de comptes—Banks—Arts. 566 et seq. C.C.P.]—See BANKS AND BANKING.

—Loan to non-trader—Prescription.]

See LIMITATION OF ACTIONS, VI.

COMMISSIONERS' COURT.

See PRACTICE AND PROCEDURE, XII.

COMMUNITY.

—Consanguinity—Prohibited degrees—Marriage without dispensation—Second marriage—Anti-nuptial contract.]

See HUSBAND AND WIFE, VII.

COMMUNANTÉ.

See HUSBAND AND WIFE, IV.

COMPANY.

I. ACTIONS BY AND AGAINST.

—Contract—Validity—Consent judgment—Terms on setting aside—Relief—Misjoinder.]—Where by contract, *ex facie* legal and regular, the appellant company purported to incur liability to the respondent for railway construction in an amount which was in reality calculated to cover the amount of bonus and of price of issued shares payable by agreement between the respondent and all the shareholders of the company, irrespective of either actual or estimated cost of construction:—Held, that the contract was *ultra vires* of the company. Held, further, reversing 26 S.C.R. 221, that a consent judgment obtained on the contract declaring the respondent's lien on the company's railway and other property, the question of *ultra vires* not having been raised either in the pleadings or on the facts stated, was of no greater validity than the contract.—In a suit by the company to set aside the contract and judgment: Held, that they must be set aside on terms which were consented to of paying to the respondent the balance due to him for construction on a *quantum meruit*, securing the amount thereof by bonds of the company if and when issued, the whole to be taken by him subject to first and other charges in favour of sub-contractors and banks who had acted on the faith of the judgment to which they were not parties without notice of the illegalities of the contract.—The company having joined some of their bondholders and shareholders as co-plaintiffs, raising questions affecting them individually:—Held, that the action of the Court should be confined to issues between the company and the defendants. *Great North-West Central Railway Co.* v. *Charlebois*, [1899] A.C. 114.

—Offences against by-laws—Summons against company—Service.]—Sec. 705 of the Municipal Act, R.S.O., c. 223, as to summary prosecution before a justice of the peace for offences against municipal by-laws applies to incorporated companies as well as to individuals, as do also ss. 562, 853 and 858 of the Criminal Code, 1892, as to services of summonses. *Re The Queen* v. *Toronto Railway Co.*, 30 Ont. R. 214.

—Procedure—Summons—Description of plaintiff.]—Where a foreign corporation plaintiff was described in the writ of summons as "a body corporate, duly incorporated, having its principal place of business in Canada, in the City of Montreal," the description was sufficient, the defendant's right to security for costs, if such right he had, not being prejudiced thereby. *Bank of British North America* v. *Howley*, 14 Que. S.C. 422.

—Gas company—Nuisance—Liability—Interim injunction.]—See *Francklyn* v. *People's Heat*

and Light Co., 32 N.S.R. 44, under title INJUNCTION.

—Transfer of shares—Mandamus to compel registry—Against whom directed.]

See MANDAMUS.

—Action—Service—Commission agent—Arts. 140, 142 C.C.P.]

See PRACTICE AND PROCEDURE, LIII.

II. CORPORATE NAME.

—Similarity of name—Deception—Injunction— The plaintiff company was registered in British Columbia, in 1892, as "The Canada Permanent Loan & Savings Company (Foreign)," and carried on business under that name until January, 1898, when it obtained a license under the Companies Act, 1897, to carry on business as "The Canada Permanent Loan & Savings Company," and the defendant company was incorporated in April, 1898, as "The British Columbia Permanent Loan & Savings Company":—Held, in an action for an injunction to restrain the defendant company from carrying on business under its name, that the two names were not so similar as to be calculated to deceive the public. *Canada Permanent* v. *British Columbia Permanent Loan & Savings Co.*, 6 B.C.R. 377.

—Registrar—Similarity of names.]—The opinion of the registrar of joint stock companies in British Columbia as to the similarity of the names of different companies is not conclusive under the Investment and Loan Societies Amendment Act, 1898, c. 7, s. 2. *British Columbia Permanent* v. *Wootton*, 6 B.C.R. 382.

III. DEBENTURES.

—Loan Company—Debenture-holders—Form of Debenture—Charge.]—The company being in liquidation under the Dominion Winding-up Act, a claim was made on behalf of holders of the company's debentures that they were entitled to a charge on the assets of the company in priority to depositors. The debentures upon which the claimants relied were headed "Land Mortgage Debenture," and contained a promise by the president and directors to pay to the person named a certain sum at a particular time and place, with interest, and were signed by the president and secretary, under whose signatures were the following words: "The payment of this debenture and the interest thereon is guaranteed by the capital and assets of the company invested in mortgages upon approved real estate in the Dominion of Canada":—Held, that these instruments created a charge upon the property of the company:—Held, per Rose and MacMahon, JJ., that such charge was upon the capital and assets of the company invested in mortgages on approved real estate situate in the Dominion of Canada at the date of the winding-up order:—Held, per Meredith, C.J., that the charge was such as entitled the debenture holders to be paid out of the assets of the company in priority to the depositors and other creditors. *Re Farmers' Loan and Savings Co.*, 30 Ont. R. 337.

IV. DIRECTORS AND OFFICERS.

—Corporate name—Use of word "Limited"—Ontario Act.]—A bill of exchange drawn by the plaintiffs upon the Burford Canning Company (Limited) was addressed to "The Burford Canning Co.," and accepted by the drawees by the signature, "The Burford Canning Co., Ltd." This was a few days after the royal assent had been given to the Ontario Act, 60 V., c. 28, s. 22 of which provided that in the case of contracts by limited liability companies the word "limited" should be written or printed in full, a previous statute, 52 V., c. 26, s. 2, having made the directors liable for the amounts due upon such contracts where the word "limited" did not appear after the name of the company where it first occurred in the contract. The writ of summons in this action (against the directors) was issued on the very day on which the royal assent was given to the Act 61 V., c. 19, s. 4 of which suspended the operation of the Act of the previous session:—Held, that the use of the abbreviation "Ltd." was not a compliance with 52 V., c. 26, s. 2.—Held, also, that the address to the "Burford Canning Co." in the draft was the first place in which the name of the company appeared in the contract, but that the fact of its having been so written there by the plaintiffs did not disentitle them to recover.—Held, also, that no stay was created by 61 V., c. 19, s 4, of any action but one brought under 60 V., c. 28, s. 22 (1), and the corresponding section of the revision of 1897, so that, upon this view of the effect of 52 V., c. 26, s. 2, the plaintiffs were entitled to recover. If, however, the use of the contraction "Ltd." was a compliance with the last mentioned section, the plaintiffs were still entitled to recover, because the contract was made some days after the passing of 60 V., c. 28, s. 22, which required the unabbreviated word "limited" to be used; and the plaintiffs, upon the execution of the contract by the Burford Canning Company (Limited), became and remained entitled to look to the directors personally, and had a vested right of action, with which the "stay" clause, s. 4 of 61 V., c. 19, could not interfere, there being nothing in it which required the Court to hold it to be retrospective. *Howell Lithographic Co.* v. *Brethour*, 30 Ont. R. 204.

—Examination of officer—Duty to obtain information from servants—Privilege.]

See PRACTICE AND PROCEDURE, XX.

V. DISSOLUTION.

—Dissolution of company—Action against bankrupt—Practice—Procedure—Garnishee order.]—A company claiming that it is absolutely defunct cannot be heard to make an application to the Court, and its receiver has no

Locus standi to be heard on that ground. Proceedings in bankruptcy and even a discharge under the insolvency laws of another country are not necessarily a bar to an action against the insolvent, and if they are a bar they should be pleaded. They cannot be set up on an application to stay proceedings in the action. Where it is alleged that the right to moneys attached in the hands of a garnishee and owing to a foreign company had passed to a receiver of the company by virtue of a winding-up order made in the foreign country by the court having jurisdiction there before the date of the attaching order:—Held, that the question of the validity of the attaching order as against the receiver or other creditors should not be determined on a chamber application to set the order aside, but in some more formal proceeding. *Brand* v. *Green*, 12 Man. R. 337.

VI. Foreign Company.

—Ontario Company.—Lending money in Quebec—Art. 5470 R.S.Q.]—A loan company constituted by virtue of a law of the Province of Ontario, may even in the absence of authority from the secretary of the province referred to in article 5470 R.S.Q., lend money in the Province of Quebec upon mortgage security. *Birkbeck Investment Security etc. Co.* v. *Brabant*, 8 Que. Q.B. 311.

VII. Formation and Objects.

—Fraudulent Conveyance — Fictitious Incorporation.]—When a limited liability company has been regularly formed in accordance with the Ontario Companies Act, for the purpose of taking over and carrying on the business of a trader who is insolvent, the conveyance of the assets of the latter to the company, though it may be open to attack on the ground that it is fraudulent and void as against creditors under the Statute of Elizabeth or the Assignments and Preferences Act, cannot be set aside at the instance of his creditors on the principle of the company being merely his *alias* or agent. *Salomon* v. *Salomon*, [1897] A.C. 22, applied. A creditor cannot take the benefit of the consideration for a conveyance and at the same time attack the conveyance as fraudulent, and therefore where creditors seized shares in a company allotted to their debtor in consideration of the conveyance by him of his assets to the company it was held that they could not attack the conveyance. *Wood* v. *Reesor* (1895) 22 Ont. App. 57, applied. *Rielle* v. *Reid*, 26 Ont. App. 54, reversing 28 Ont. R. 497 and C.A.Dig. (1897) 32.

VIII. Penalties.

—Statutory returns—Duplicate list—R.S.O. c. 191, s. 79.]—A list of shareholders transmitted to the Provincial Secretary contained the name of a person as holding a certain amount of stock in a joint stock company, while in the list posted up in the head office of the company the shareholder's name was inadvertently deleted:—Held, that the lists were not duplicates within the meaning of R.S.O. c. 191, s 79, the Ontario Companies Act, and that the company were liable to a penalty under the Act. Circumstances considered in moderating the amount of penalty. *Towner* v. *Hiawatha Gold Mining and Milling Co.*, 30 Ont. R. 547.

IX. Powers of Company.

—By-law—Prejudice to shareholders.]—A by-law or resolution 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. *North-West Electric Co.* v. *Walsh*, 29 S.C.R. 33.

X. Sale of Assets.

—Injunction—Trade name—Colourable imitation—False representation.]—The appellant company, being the transferee of the assets and goodwill of the dissolved Sabiston Lithographing and Publishing Company sued to restrain the respondent from carrying on business under the name of the Sabiston Lithographing and Publishing Company, or any other name so framed as to lead to the belief that his business was in succession to that of the dissolved company:—Held, that the respondent had no right so to represent, but that there was no evidence that he had done so, and that the appellants were not entitled to an injunction against the mere use of the name. *Montreal Lithographing Co.* v. *Sabiston* [1899] A.C. 610, affirming 6 Que. Q.B. 510; C.A. Dig. (1898) 80.

—Fraudulent sale by directors—Collusion.]—In an action to set aside a sale of a mineral claim on the ground that the sale was a sham sale for the benefit of the purchaser and the Directors, and that the stated consideration was not paid, and the trial Judge found that the sale was made at a price so inadequate as to shew an intention to benefit the purchaser at the expense of the shareholders. Held, on appeal that on the finding of the trial Judge the sale should be set aside. *Per* Irving and Martin, JJ.: The provisions of s. 2 of the Companies Amendment Act, 1893, respecting the mode of sale of a Company's assets are enabling and not restrictive. *Daniel* v. *Gold Hill Mining Company*, 6 B.C.R. 495.

XI. Stock.

—Directors — By-law — Discount shares — Calls for unpaid balances—Contributories.]—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. 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. *North-West Electric Co.* v. *Walsh*, 29 S.C.R. 33, reversing 11 Man. R. 629.

—Shares—Blank transfer—Fraud—Usage of stock exchange—Bonâ fide holder for value—Validity.]—The registered owner of shares in a company gave to her brokers, for the purpose of selling the shares, the certificate of ownership upon the face of which the shares were stated to be transferable on the books of the company in person or by attorney upon surrender of the certificate and upon which was indorsed a transfer and power of attorney, signed by her, and having a blank left for the name of the transferee. The brokers improperly deposited the certificate as security for advances to them with a bank, who received it in the ordinary course of business without any notice of the owner's rights. There was evidence at the trial that, according to the usages of the stock exchanges of Ontario and Quebec, such a share certificate so endorsed passes from hand to hand and is recognized as entitling the holder to deal with the shares as owner and pass the property in them by delivery, or to fill in the blank with his own name and have the shares so registered on the books of the company:—Held, that the bank was entitled to hold the shares as against the owner. *Francis* v. *Clark*, 26 Ch. D. 257, distinguished. *Smith* v. *Rogers*, 30 Ont. R. 256.

—Request for shares—Acceptance by company.]—A person who has signed a request for shares in the capital stock of a company only becomes a shareholder when the company has accepted his request and assigned to him the shares. A letter from the Secretary of the Company informing the subscriber that the shares acquired have been assigned to him, when the authorization of the Company is not shewn, and even the entry of the subscriber's name as shareholder in the books of the Company, is not sufficient, in the absence of proof of the assignment of the shares, to cause him to be considered a shareholder. *Common* v. *Matthews*, 8 Que. Q.B. 138.

—Petition under The Companies Act (Can.)—Payment of succession duties—Trust—Costs.]—On a petition under s. 50 of R.S.C., c. 119, for an order awarding certain shares in the petitioner's stock held by deceased person in trust, the petitioner alleging that it had doubts because the succession duties had not been paid, and further, because it was not shewn for whom the trust had been created, the non payment of succession duties does not prevent the heirs and executors from taking possession of the deceased's estate, the prohibition being only against transfers by them (55 & 56 V., c. 17; R.S.Q., Art. 1191(*d*), par. 5). and further the corporation was not bound to see to the execution of trusts (R.S.C., c. 119, s. 81).—Costs on the petition, were, however, refused, the Court considering that no doubt existed sufficient to justify the proceeding. *In re Denoon*, 15 Que. S.C. 567.

XII. Winding-up.

(*a*) *Contributories.*

—Irregular organization—Forfeiture—Cancellation of stock.]—After the issue of the order for the winding up of a joint stock company incorporated under "The Companies Act," a shareholder cannot avoid his liability as a contributory by setting up defects or illegalities in the organization of the company; such grounds can be only taken upon direct proceedings at the instance of the Attorney-General. The powers given the directors of a joint stock company under the provisions of "The Companies Act" as to forfeiture of shares for non-payment of calls is intended to be exercised only when the circumstances of the shareholders render it expedient in the interests of the company and cannot be employed for the benefit of the shareholders. *Common* v. *McArthur*, 29 S.C.R. 239; reversing 8 Que. Q.B. 128.

(*b*) *Liquidator.*

—Powers of Liquidator—Jurisdiction of Court—Discretion—Consulting creditors.]—The power of the Superior Court to authorise the liquidator of an insolvent company to act in the name of the company and to settle pending proceedings, is a discretionary power, and the Court of appeal should not interfere in the exercise of this discretion, except where the judge has exercised it unreasonably. The liquidator is not obliged to consult the creditors of the company before applying to the Court for authority to effect a settlement. *Morin* v. *Bilodeau*, 8 Que. Q.B. 330.

—Civil imprisonment—Rule nisi—Art. 837 C.C.P.]—When a judgment has ordered a liquidator to pay immediately a certain sum, and has ordered his imprisonment in default of obedience to said judgment, that liquidator cannot plead to a rule *nisi* that he cannot be forced to make such payment until the liquidation of the insolvent estate is complete. *Queen's Hotel Co.* v. *Radford*, 2 Que. P.R. 113.

(*c*) *Pledging Assets.*

— Loan company — Winding-up — Debenture-holders.]—The company being in liquidation under the Dominion Winding-up Act, a claim was made on behalf of holders of the company's debentures that they were entitled to a charge on the assets of the company in priority to depositors. The company was formed on the 19th October, 1871, under C.S.U.C., c. 53, by s. 38 of which the right of a society, formed under it to borrow money, if authorized by its rules to do so, was recognized. By rule 7 of the company, passed under the authority of s. 2 of c. 53, C.S.U.C., the directors were authorized to borrow money for the use and on the assets of the

company, to receive money on deposit, and to "loan" or invest such money either on mortgage on real estate or in any other way they might think best for the interests of the institution:—Held, that the company was invested with the power to borrow money for its purposes, and to give security upon its assets for the payment of the money borrowed. *Murray* v. *Scott*, 9 Ont. App. 519, followed. And this power to pledge the assets was one which might be delegated to the directors under C.S.U.C., c. 53, s. 5. *Re Farmers' Loan and Savings Co.*, 30 Ont. R. 337.

(*d*) *Provincial Incorporation.*

—Winding-up Amendment Act (Can.) 1889—Application of to provincial company.]—A company incorporated under the Companies Act, 1890 (B.C.), may be put into compulsory liquidation and wound up under the Dominion Winding-up Amendment Act of 1889. *Re British Columbia Iron Works Company*, 6 B.C.R. 536.

(*e*) *Receiver-General.*

—Balance in hands of liquidator—Payment out to Receiver-General.]—By virtue of 52 V., c. 32, s. 20 (D.), the Divisional Court has jurisdiction to entertain an appeal from the ruling and decision of the Master in Ordinary, on a reference to him under that section. The judgments of the Court of Appeal and of the Supreme Court in this case (24 Ont. App. R. 470, 28 S.C.R. 192), are conclusive on the point that the moneys repaid into Court in this matter, pursuant to those judgments, after having been erroneously paid out to certain applicants, being the balance unclaimed in the hands of the liquidator by an insolvent bank after passing their final accounts, were the property of the Receiver-General of Canada under R.S.C., c. 129, s. 41, subject to the liability of paying it over to the persons entitled thereto. *Re Central Bank of Canada*, 30 Ont. R. 320.

(*f*) *Winding-up order.*

—Winding-up—Petition—Forum.]—An order for the winding-up of a company, upon petition, under R.S.C., c. 129, may be made by a Judge in Chambers. *Re Toronto Brass Co.*, 18 Ont. Pr. 248.

—Insolvency—Affidavit.]—To the making of a winding-up order, it is essential: (1) That the petition upon its face make a sufficient case for the winding-up, and (2) That the petition should be supported by a sufficient affidavit filed before its presentation. Leave to file a supplementary affidavit refused. *Re Kootenay Brewing Co.*, 6 B.C.R. 112.

—Application for—Summons.]—All applications made to the Court in respect of its winding-up jurisdiction must be made by summons. *Re Nelson Saw Mill Co.*, 6 B.C.R. 156.

COMPENSATION.

See DEBTOR AND CREDITOR, VII.

CONFESSION.

—Confession of person charged with criminal offence.]—See CRIMINAL LAW, VII. (*a*).

CONFLICT OF LAWS.

—Suretyship—Postmaster's bond—Lex loci contractûs.]—In an action by the Crown on the information of the Attorney-General for Canada upon a bond executed in the Province of Quebec in the form provided by the "Act respecting the Security to be given by the Officers of Canada" (31 Vict., c. 37; 35 Vict., c. 19), and "The Post Office Act" (38 Vict., c. 7):—Held (Sir Henry Strong, C.J., dissenting) that the right of action under the bond was governed by the law of the Province of Quebec. *Black* v. *The Queen*, 29 S.C.R. 693.

—Maritime law—Necessaries supplied to foreign ship in foreign port—Owners domiciled out of Canada.]—The Exchequer Court of Canada, under the provisions of 24 Vict., c. 10, s. 5, may entertain a suit against a foreign ship within its jurisdiction for necessaries supplied to such ship in a foreign port, not being the place where such ship is registered, and when the owners of the ship are not domiciled in Canada: *Cory Bros.* v. *The Mecca* (1895) P.D. 95 followed. Under the principles of international law, the Courts of every country are competent, and ought not to refuse, to adjudicate upon suits coming before them between foreigners. This doctrine applies with especial force to commercial matters, and is declared in the provisions of Art. 14 C.C.P. (L.C.) and Arts. 27, 28 and 29 C.C. (L.C.) *Coorty* v. *The "George L. Colwell,"* 6 Can. Ex. C.R. 196.

— Jurisdiction — Foreign lands — Constructive trustees—Limitation of actions.]—Action to have it declared that a conveyance of lands out of Ontario, made in 1878, by the plaintiff to one of the defendants, though absolute in form, was in equity a mortgage, and for redemption. The grantee in 1893 made an absolute conveyance of the lands to the other defendants. All the parties resided in Ontario:—*Semble*, that had the plaintiff's grantee not conveyed to others, and the action been against him alone, it would have lain; but—Held, that the Court had no power to declare the other defendants constructive trustees of foreign lands; and also that their defence of the Statute of Limitations raised a question of title the determination of which involved the application of the law of the foreign country. *Gunn* v. *Harper*, 30 Ont. R. 650.

—Railway Co.—Receiver—Foreign appointment—Seizure—Immovables by destination—Arts. 6, 1968, 1981 C.C.]—Receivers appointed by a foreign Court of a railway company subject to the jurisdiction of the Courts in Quebec may, in that capacity, take legal proceedings

(*ester en justice*) in said province to oppose seizure of the company's property when the judgment appointing them, according to the law of the foreign country, authorizes them to take legal proceedings for all purposes of their administration.—When the law of the foreign country does not, after the appointment of a receiver, permit the seizure of property of a railway company, a resident of the Province of Quebec who, as agent (*prête-nom*) of a creditor in the foreign country, has obtained in the Quebec Courts a judgment against the company, cannot cause to be seized, in the province, the locomotives and cars which may be, at the time of the seizure, upon the lines of the railway not belonging to the company, but forming part of its system.—The words "*droits de gage*," in the second paragraph of Art. 6 C.C., mean the security which is in question under Arts. 1698 *et seq.*, and not the lien given by Art. 1981 to a creditor upon the property of his debtor.—Locomotives and cars used for the working of a railway are immovable by destination, even when they may be temporarily on a road which, without belonging to the railway company, forms part of its system, and are governed by the law of the country in which the railway is situated; therefore, they are not susceptible of seizure as movables (*saisie mobilière*). *Barker* v. *Central Vermont Ry. Co.*, 14 Que. S.C. 467, affirmed on review Nov. 3rd, 1899.

—Property in Quebec — Rights of heirs — Lex loci.]—The rights and liabilities of alleged heirs domiciled abroad in relation to immovables situate in the Province of Quebec are governed by the law of Quebec. *Page* v. *McLennan*, 14 Que. S.C. 392.

—Life Insurance — Domicil of insured — Foreign and domestic administrator.]

See INSURANCE, III.

—Insurable interest of mother in life of child —Ontario law—New York State law.]

See INSURANCE, III.

— Husband and wife — Joint note — Validity — Separate estate—Foreign law—Judgment.]

See PRACTICE AND PROCEDURE, XXXVIII.

And see DOMICILE.

CONSTITUTIONAL LAW.

I. DISTRIBUTION OF FEDERAL AND PROVINCIAL POWERS.

— Ice — Water and watercourses — Public harbour.]—The plaintiff was the owner of a lot bounded by the water's edge of Lake Simcoe, and also of the adjoining lot covered by the waters of that lake, there not being in the patent of either lot any special reservation of right of access to the shore:—Held, that he was entitled to the ice which formed upon the water lot and had the right to cut and make use of it for his profit; that no other person was entitled to cut and remove the ice except in the *bonâ fide* and advantageous exercise of the public easement of navigation; and that the defendants were not exercising that easement when they cut channels through the plaintiff's ice in which to float to shore blocks of ice cut by them beyond the limits of the plaintiff's water lot; Held, also (Osler, J.A., expressing no opinion), that the *locus in quo*, a small bay in Lake Simcoe, at which there was a wharf where, with the permission of the owner, vessels used to call, but no mooring ground and little shelter except from wind off the land, was not a public harbour within the meaning of the British North America Act, and that the plaintiff's grant from the province was valid. *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.*, 26 Ont. App. 411, reversing 29 Ont. R. 247 and C.A.Dig. (1898) 309.

See APPEAL, XI. (*f*)

II. DUAL LANGUAGE.

—Variance between French and English versions of statute — Interpretation — Penalty.] — The English and French versions of our statutes are of equal authority, but when a difference occurs between the two versions, there is uncertainty as to the intention of the Legislature, and one or other of the versions much prevail according to the following rules:—(1). If the variance occurs in a statute consolidating previous statutes, or in a statute founded upon our pre-existing law, that version must prevail which is the more consistent with the former law:—(2). If the variance occurs in a statute changing the law that version shall prevail which is the more consistent with the intention of the Legislature, and the ordinary rules of legal interpretation shall apply, to determine such intention. Thus, where a statute authorizes the City of Sherbrooke to pass by-laws for certain purposes, and the English version gives the Council power to provide a penalty for the infraction of any such by-law, while the French limits that power to penalties for by-laws of a certain class, the French version must prevail under the rule requiring the interpretation of penal statutes to be restrictive. *Roy* v. *Davidson*, 15 Que. S.C. 83.

III. EXECUTIVE POWER.

—Employment of public monies—Guarantee of interest on bonds—Validity of order-in-council.]

—The Sovereign has the right, by order-in-council, to deal with all matters respecting the government of the country or the administration of its public affairs when its action is not restricted by a constitutional principle or a prohibitory statute. The Crown is restricted with respect to the employment of monies derived from the public property or raised by the taxes imposed upon the people, and it has no right to appropriate, take or use such monies or taxes without a specific grant. But in the present case the execution of the contract entered into does not require the expenditure of any public monies, and, therefore, there is no constitutional limitation and no statutory prohibition against the contract which was entered into, such contract being *intra vires* of the government of the Province, even without any authority from the statutes referred to. In consequence, the order-in-council of the 27th April, 1897, which grants a guarantee by the government for the payment of interest upon bonds to be issued by the Atlantic & Lake Superior Railway Company upon the deposit of the amount necessary to meet such interest, is not *ultra vires*. *Province of Quebec* v. *Atlantic & Lake Superior Ry. Co.*, 8 Que. Q.B. 42.

IV. Legislative Powers.

(*a*) *Dominion.*

—B.N.A. Act, s. 91, s.s. 29, and s. 92, s.s. 10—Municipal Code of Quebec—Powers of Provincial Legislature—Dominion Railway.]—By the true construction of the British North America Act, 1867, s. 91, s.s. 29, and s. 92, s.s. 10, the Dominion Parliament has exclusive right to prescribe regulations for the construction, repair and alteration of the appellant railway; and the provincial legislature has no power to regulate the structure of a ditch forming part of its authorized works. The provisions of the municipal code of Quebec, which prescribe the cleaning of the ditch and the removal of an obstruction which had caused inundation on neighbouring land, are *ultra vires* of the provincial legislature. *Canadian Pacific Ry. Co.* v. *Parish of Notre Dame de Bonsecours* [1899], A.C. 367, affirming 7 Que. Q.B. 121.

—Railways—51 Vict., (D.) c. 29, s. 289—Negligence—Damages—Constitutionality.]—Section 289 of the Dominion Railway Act, 51 Vict., c. 29, giving to any person injured by the failure to observe any of the provisions of the Act a right of action "for the full amount of damages sustained" is *intra vires*, and the limitation of amount mentioned in the Workmen's Compensation for Injuries Act does not apply to an action by a workman or his representatives under this section. *Curran* v. *Grand Trunk Ry. Co.* 25 Ont. App. 407.

—Grand jury panels—Criminal Courts and procedure—Powers of Dominion and Provincial Legislatures.]—See Criminal Law, XVI.

(*b*) *Provincial.*

—B.N.A. Act, s. 91, s.s. 25, and s. 92, s.s. 10, 13—"Coal Mines Regulation Act, 1890," (B.C.) s. 4—Naturalization and aliens—Chinamen.]—Section 4 of the British Columbian "Coal Mines Regulation Act, 1890," which prohibits Chinamen of full age from employment in underground coal workings, is in that respect *ultra vires* of the provincial legislature. Regarded merely as a coal-working regulation, it would come within s. 92, s.s. 10, or s. 92, s.s. 13, of the British North America Act. But its exclusive application to Chinamen who are aliens or naturalized subjects establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament conferred by s. 91, s.s. 25, in regard to "naturalization and aliens." *Union Colliery Co.* v. *Bryden* [1899], A.C. 580.

—Provincial legislature—Cattle Protection Acts, 1891, 1895 (B.C.).]—The provision in the British Columbia Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is *ultra vires* of the provincial parliament. *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* [1899] A.C. 367, distinguished. *Madden* v. *Nelson and Fort Sheppard Railway Co.* [1899] A.C. 626, affirming 5 B.C.R. 541, C.A. Dig. 1898, 86.

—Modes of executing judgment—Change in law—Existing rights—Contrainte par corps—New Code of Procedure.]—Under the new Code of Procedure in Quebec an arrest (*contrainte par corps*) can only be ordered on a judgment for slander where the damages awarded amount to $50; art. 833 of the New Code has been substituted for art. 2272 C.C.—In proceedings begun before the new code came into force the plaintiff could not invoke a vested right to an arrest because the modes of executing a judgment are only derived from the law and the legislature may change and modify them at will without regard to existing rights. *Roger* v. *Loranger*, 8 Que. Q.B. 119.

—Taxation—Delegation of powers to municipal corporations—Mode of exercise.]—Within the limits prescribed by the constitution, the authority of the Parliament and of the Legislatures is absolute, and their power to impose taxation is not restricted by the rules, the mode and the procedure to which municipal corporations are subjected. Therefore, the legislature had the right to impose taxation upon all callings exercised in the City of Quebec, without naming and specifying them, and also had the power by statute to cover the insufficiency of a by-law in that respect and to give it the same effect as a statute would have. *City of Quebec* v. *Grand Trunk Ry. Co.*, 8 Que. Q.B. 246, affirmed by Supreme Court, June 5th, 1899.

—**Electric Co.—Exclusive franchise—Municipal by-law—Restriction of trade.**]—Electric light, being a thing of general utility, is by its nature a commercial matter.—A municipal by-law, even confirmed by provincial legislation, granting an exclusive franchise for thirty years to a person or a company for the lighting of a city, constitutes a restriction of trade contrary to the provisions of the B.N.A. Act, and is, therefore, *ultra vires*. Permission to place poles and wires on the streets is only an accessory of the franchise and becomes of no effect, the main privilege being unconstitutional. *Hull Electric Co.* v. *Ottawa Electric Co.* 14 Que. S.C. 124.

—**Quebec Pharmacy Act.**]—The provisions of the Quebec Pharmacy Act respecting the keeping of drug stores are within the competence of the Quebec Legislature. *In re Girard*, 14 Que. S.C. 237.

—**Authority to grant exclusive franchise to operate electric tramways.**]—The legislatures of the provinces have sovereign powers within the range of subjects falling within the scope of provincial jurisdiction, including the governance of municipal institutions, and the courts cannot set aside legislation relating to such matters upon the ground that constitutional principles have been violated. A by-law granting an exclusive privilege to a particular company to operate electric tramways for a term of ten years within a municipality comes within the scope of the authority of a town corporation which has been vested with the right to authorise the construction and operation of tramways upon such terms as it shall see fit. The contract in question in this case having been confirmed by 57 Vict. (Q.), c. 73, the plaintiffs were without interest to contest the validity of the by-law on which it was based. Moreover the action was prescribed. *Bell* v. *Town of Westmount*, 15 Que. S.C. 580.

—**Municipal corporation—Tax on laundry—59 V., c. 49, s. 6 (P.Q.)—Competence of legislature.**]—The provisions of the Statute, 59 V., c. 49, s. 6 (P.Q.), which empower the City of Montreal to impose a tax on laundries are within the competence of the legislature of the Province of Quebec. *Lee* v. *De Montigny*, 15 Que. S.C. 607.

—**Taxation—Income of Dominion employée.**—A Provincial Legislature has no power to impose a tax upon the official income of an employée of the Dominion Government, nor to confer such a power on the municipalities. *Ex parte Timothy Burke*, 34 N.B.R. 200.

—**Validity of provincial statute—Leave to appeal to Privy Council in such case.**]

See APPEAL, XI. (*a*).

V. PROVINCIAL LIABILITIES.

—**British North America Act, s. 111—Liability of Province of Canada existing at time of Union—Jurisdiction—Arbitration—Condition precedent to right of action—Waiver.**]—By the Act 8 V. (P.C.), c. 90, Y. was authorized at his own expense to build a toll-bridge, with certain appurtenances, over the River Richelieu in the Parish of St. Joseph de Chambly, P.Q., such bridge and appurtenances to be vested in the said Y., his heirs, etc., for the term of fifty years from the passing of the said Act; and it was enacted that at the end of such term the said bridge and its appurtenances should be vested in the Crown and should be free for public use, and that it should then be lawful for the said Y., his heirs, etc., to claim and obtain from the Crown the full and entire value which the same should at that time be worth exclusive of the value of the tolls, such value to be ascertained by three arbitrators, one of which to be named by the Governor of the Province for the time being, another by the said Y., his heirs, etc., and the third by the said two arbitrators. The bridge and its appurtenances were built and erected in 1845, and Y. and his heirs maintained the same and collected tolls for the use of the said bridge until the year 1895, when the said property became vested in the Crown under the provisions of the said Act.—Held, that upon the vesting of the bridge and its appurtenances in the Crown, the obligation created by the said statute to compensate Y. and his heirs, etc., for the value thereof was within the meaning of the 111th section of the British North America Act, 1867, a liability of the late Province of Canada, existing at the Union, and in respect of which the Crown, as represented by the Government of Canada, is liable. 2. That the Exchequer Court had jurisdiction under clause (d) of the 16th section of the Exchequer Court Act in respect of a claim based upon the said obligation, it having arisen under the said provisions of the British North America Act, 1867, which, for the purposes of construction of the said 16th section of the Exchequer Court Act, was to be considered a law of Canada. 3. That under the wording of the said Act 8 V. (P.C.), c. 90, no lien or charge in respect of the value of the said property existed against the same in the hands of the Crown. 4. Where both the Governments of Ontario and Quebec, on one or both of which the burden of the claim would ultimately fall, had expressed a desire that the matter should be determined by petition of right and not by arbitration, and where the suppliants, with knowledge thereof, had presented their petition of right praying that a fiat thereon be granted, or, in the alternative, that an arbitrator be appointed by the Crown, and naming their arbitrator in case that course were adopted, and the Crown on that petition had granted a fiat that "right be done," even if the appointment of arbitrators for the purpose of ascertaining the value of the said bridge and its appurtenances, as provided in 8 V. (P.C.), c. 90, constituted a condition precedent to a right of action accruing for the recovery of the same, such a defence must, under the above circumstances, be held to have been waived by the Crown. *Yule* v. *The Queen*, 6 Can.

Ex. C.R. 103. Affirmed on appeal to Supreme Court of Canada. Leave to appeal to P.C. refused.

CONTEMPT OF COURT.

—Municipal Corporation—Committee of Council—Powers.]—When a municipal corporation appoints a committee to investigate an account presented to it, such committee does not possess the powers of a judicial tribunal, and the issue of a rule by it against a person, declaring him in contempt of the committee, and ordering that he be imprisoned until he appear and give testimony before the committee, is in excess of its powers, and null and void. *Lussier* v. *Corporation of Maisonneuve*, 15 Que. S.C. 45.

—Newspaper comments pending suit—Application to commit.]—The Supreme Court (B.C.) has no power to decide the validity of the appointment of one of its members. The Court has power summarily to commit for constructive contempt notwithstanding ss. 290, 292 and 293 of the Criminal Code; but the Court will not exercise the power where the offence is of a trifling nature, but only when necessary to prevent interference with the course of justice. A statement in a newspaper editorial to the effect that one of the parties to a pending suit will lose the case, is a contempt of Court. A statement to the effect that a Judge of the Court having taken an active part in a general election, would have to devote his spare moments into schooling him into forgetfulness of his political career, is not a contempt. A statement to the effect that the spectacle of such Judge trying election cases is not edifying and that it does not produce a good impression on the public mind, is not a contempt. A party to a suit has status to move to commit a stranger to the suit for constructive contempt, although no affidavit is fyled by him or on his behalf to the effect that the alleged contempt is calculated to prejudice him in his suit. Any person may bring to the notice of the Court any alleged contempt. *Stoddard* v. *Prentice*, 6 B.C.R. 308.

See PRACTICE AND PROCEDURE, XIV.

CONTRACT.

I. BREACH OF CONTRACT.

—Ship—Breach of contract to carry passengers—Action in rem.]—The plaintiff for an alleged breach of a contract to carry him from Liverpool to St. Michaels, and thence to the Yukon gold fields, took proceedings against the ship and obtained a warrant for her arrest:—Held, that even if the breach alleged was established, the plaintiff was not entitled to a lien on the ship. *Cook* v. *The "Mananence,"* 6 Can. Ex. C.R. 193.

—Hiring of services or mandate—Distinction and termination—Damages and indemnity.]—Where the contract is one of *louage de services* or a *mandat*, if the defendant in putting an end thereto unjustly and wrongfully acts towards the plaintiff, the latter should be indemnified against all loss directly flowing from the defendant's wrongful act, and which might have been foreseen when the contract was made.—The whole doctrine as to tacit renewal rests not on a mere legal enactment, but originates in the natural and reasonable presumption that the parties have so willed. Therefore, under favourable circumstances, there is no objection to apply the principle of tacit renewal to a mandate or to some other particular contract. The mandate, being susceptible of being tacitly formed, can also be tacitly renewed. *Delaney* v. *Love*, 14 Que. S.C. 40.

—Injunction—Covenant by vendor of business—Art. 957 C.C.P.]—An injunction will be granted at the suit of the purchaser of a business to restrain the vendor from violating a stipulation in the agreement of sale whereby the vendor agreed not to enter the same business again at any time or help anyone to do so.—Such a stipulation is violated when the vendor enters the employ of a rival firm in the same locality as their manager and soliciting agent. *Cook* v. *Brisebois*, 2 Que. P.R. 162.

—Letters—Stenographic notes of—Property in—Implied contract between stenographer and employer—Injunction to restrain breach.]

See INJUNCTION.

—Contract of hiring—Wrongful dismissal of servant.]—See MASTER AND SERVANT, III.

II. Cancellation.

—12 V., c. 183, s. 20 (Can.)—Construction—Right to stop supply of gas generally.]—By the true construction of s. 20 of 12 V., c. 183 (Can.), borrowed from the Gasworks Clauses Act, 1847 (Imp.), the appellant company is authorized to cease supplying the respondent with gas at any of his houses on his neglect to pay its bill for any one of them. There is nothing in the section to limit the authority of the company to the particular building in respect of which there has been default, and such a limitation cannot be implied. *Montreal Gas Co.* v. *Cadieux* [1899], A.C. 589, reversing 28 S.C.R. 382.

—Sale of real property—Deed of sale not signed by purchaser—Rights of the parties—Cancellation of contract—Acquiescence.]—The appellants purchased certain land from respondent, and a deed embodying the conditions of sale was prepared by a notary and was signed by respondent and one of the appellants, but not by the other appellant. The appellants advanced nothing on account of the price and were never put in possession. About a month afterwards, the respondent having discovered that the deed had not been signed by one of the purchasers, notified them, by letter of 19th February, that if the deed was not signed that day she would cancel her signature and claim damages. Either on the next or succeeding day, the respondent, finding the deed still incomplete, struck out her signature. The deed was subsequently, on the same day, signed by the other appellant but no notice was given to respondent of this fact, and nothing more was done for five months, when the appellants brought the present action to enforce execution of the contract:—Held, that a contract existed between the parties, and could have been enforced by either party at the time; but the purchasers, having neglected to complete the deed within a reasonable delay, and, even after the respondent had cancelled her signature, having neglected to take any step for a further period of five months, must be deemed to have acquiesced in the cancellation of the contract. *McLaurin* v. *Smart*, 7 Que. Q.B. 554.

III. Commercial Contract.

—Bill of lading—Notice of arrival of goods—Breach of contract—Damages—Prescription.]

See Limitation of Actions, VI.

IV. Completion of Contract.

—Exchange of goods—Rules applicable thereto—When contract completed—Right of revendication.]—The contract of exchange of goods, being governed by the rules concerning sale, is complete by the consent alone of the parties thereto at the time of the appropriation to the contract of the specific goods exchanged, even though the delivery has not taken place. Where appellant, in Montreal, agreed to exchange goods with respondents in Liverpool, and appellant shipped his goods on board the cars at Montreal according to the agreement, his goods were then appropriated to the contract, and having executed his part of the agreement, he was entitled to the delivery of respondents' goods, which, similarly, were appropriated to the contract when shipped on board the vessel at Liverpool, on appellant's account and at his risk. The property of the goods then passed to the appellant, and he was entitled to revendicate them on their arrival in Montreal. Although the bills of lading were made one to the shippers' order and the other to the order of their agent in Montreal, it did not appear that this was intended to prevent the property in the goods from passing to the purchaser. *Vipond* v. *Kitterick*, 8 Que. Q.B. 11.

—Contract for sale of deals—Delivery—Marking—Detention for payment—Insolvent vendor.]

See Sale of Goods, III.

V. Consideration.

—Consideration in part illegal—Stifling prosecution.]—Held, that the promissory notes sued upon in this action were given on an illegal agreement, of which the plaintiff must be taken to have had knowledge; that the whole agreement, being based upon the understanding that one of the defendants was to be discharged from custody, was illegal and void; and the plaintiff could not properly litigate the right to certain other promissory notes transferred by one of the defendants to another. *Leggatt* v. *Brown*, 30 Ont. R. 225, affirming 29 Ont. R. 530 and C.A. Dig. (1898), 98.

—Prosecution—Offence against revenue laws—Money paid to procure discharge.]—The plaintiff alleging that he had paid the defendant a sum of money to secure his (plaintiff's) discharge from a prosecution for an offence under the Inland Revenue Acts, and that defendant had not procured plaintiff's discharge, sued for the return of the money:—Held, that as the plaintiff alleged that the charge brought against him was false and unfounded, and the contract referred to in the declaration did not disclose that the agent was expected to adopt any unlawful means to procure the discontinuance of proceedings, and the contract was not necessarily one against public order, the action was not demurrable. *Latraverse* v. *Morgan*, 14 Que. S.C. 511.

VI. Construction.

(a) Conditions.

—Reference to engineer.]—The rule that a contractor is bound by a condition in his contract making the employer's engineer the interpreter of the contract and the arbiter of all disputes arising under it, does not extend to a case where the named engineer, while in fact the engineer of the employer, is described in the contract as, and is supposed by the contractor to be, the engineer of a

third person. *Good* v. *Toronto, Hamilton and Buffalo Ry. Co.*, 25 Ont. App. 133.

—**Dependent or independent covenants—License—Forfeiture.**]—To determine whether covenants or agreements are dependent or independent, they are to be construed according to the intent and meaning of the parties, to be collected from the instrument, and to the circumstances legally admissible in evidence with reference to which it is to be construed. Where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract. An agreement made between the commissioners for the Queen Victoria Niagara Falls Park (with the approval of the Government of the Province of Ontario) and the company, by which the latter were granted a license for twenty years (with provision forrenewal), at a fixed rental, to take water from the Niagara river for the purpose of generating and developing electricity for transmission beyond the park, contained a provision (4) for re-entry on default of payment of rent, a provision (9) that the commissioners should not grant the same right to others during the company's term, nor themselves use the water for the same purpose, and also contained the two following clauses: "(10) The company undertake to begin the works . . . on or before the first of May, 1897; and to have proceeded so far . . . on or before the 1st of November, 1898; that they will have completed water connections for the development of 25,000 horse power, and have actually ready for use, supply and transmission, 10,000 developed horse power by the said last mentioned day." "(13) If the company should at any time or times continuously neglect for the space of one year effectually to generate electricity or pneumatic power, as hereby agreed by the company, unless hindered by unavoidable accident, the Lieut.-Governor in Council may then and from thenceforth declare this agreement, the liberties, licenses, powers, and authorities thereby granted, and every one of them, to be forfeited, and thenceforth the same shall cease and determine and be utterly void and of no effect whatever." The company, although they began the works by the time limited, failed to proceed with them on or before the 1st November, 1898, so as to comply with paragraph 10, not having been hindered by unavoidable accident :—Held, that the agreement was not, by reason of such failure, determined void, and of no effect, nor could it be so declared by the park commissioners. (2) That the Lieut.-Governor in Council, or the commissioners, could not, by reason of the non-generation of electricity by the 1st November, 1898, or by reason of the failure of the company to proceed, declare the agreement forfeited. (3) That the Government and the commissioners were not relieved from the agreement contained in paragraph 9. Per Meredith, C.J.,—Paragraph 10 is to be treated as a promise or covenant, and not as a condition, (1) because of its form; (2) because the stipulation does not go to the root of the consideration, and is therefore a subsidiary promise rather than a vital one; (3) because the agreement contained an express provision for forfeiture, in certain events — paragraph 13. And *semble*, that a breach of the undertaking in paragraph 10 is within the provisions of paragraph 13. *Re Canadian Niagara Power Company*, 30 Ont. R. 185.

— **Insurance Agent — Commission on renewal premiums.**]—The defendant, by his contract with the company plaintiff, was to be allowed as compensation, "a commission on the original or renewal cash premiums which shall during his continuance as such agent (of plaintiff) be obtained, collected, paid to, and received by said (plaintiff) up to and including the year of assurance, should his agency continue so long, on policies of insurance effected with the (plaintiff) by or through the (defendant), at and after the following rates." (Here followed rates of commission on original cash premiums for the several classes of insurance, also schedule of rates of commission on renewal of premiums):—Held, that the defendant, under the above agreement, after he had ceased to be employed by the company plaintiff, was no longer entitled to any commission on the renewal premiums received by the company on the business which had been obtained by the defendant, on which renewals, if he had remained in the company's service, he would have been entitled to the rates specified in his agreement. *New York Life Insurance Co.* v. *Dubeau*, 15 Que. S.C. 100.

—**Interpretation of deeds—Stipulations in deed of sale—Third parties—Rights of mortgagees.**]—A stipulation in a deed of sale, by a father to his son, whereby the latter was obliged to maintain his sister, so long as she remained unmarried, on condition that she should render household service, to the best of her ability, is not a *don* to his daughter, but the creation of a reciprocal obligation.—Such reciprocal obligation, having been made by the father during the minority of his daughter, required her acceptance when she reached the age of majority.—The daughter, having declined to acquiesce in such arrangement, and having refused to live with her brother for several years, until the filing of the present opposition, which is her only act of acceptance, cannot now claim a priority of hypothec on the property mortgaged for her said maintenance, over a subsequent mortgagee, who had duly registered his hypothec anterior to the filing of the opposition. *Birmingham* v. *Brabant*, 5 Rev. de Jur. 169.

—**Contract for construction of railway—Conditions as to payment of laborers—Certificates—Termination of contract.**]—Plaintiffs and the defendant company entered into a contract in writing under which plaintiffs were to do certain work on the defendant's railway. One of the terms of the contract was that before each payment was due, plaintiffs were

to furnish evidence satisfactory to defendant that all laborers employed by plaintiffs on any work being done by them for the defendant had been paid:—Held, affirming the decision of the trial judge, that the defendant company was precluded from setting up this condition by having measured the work and materials and paid plaintiffs or their laborers all that the defendant admitted to be due; held, also, that plaintiffs, having paid their men in full, were not precluded from recovering the amount found to be due them. The agreement contained a provision under which the defendant company was enabled to terminate the contract after five days' notice, in case the plaintiffs, after notice, failed to push the work in a manner satisfactory to the company. The contract having been terminated and the work having been taken by the company into their own hands:—Held, that plaintiffs were entitled to payment for work completed at the time of the termination of the contract, but only where, as provided, the work in question had been completed in strict accordance with the plans and specifications, and was, in every way, acceptable and satisfactory to the company's engineer, and the engineer of the province; held, also, that the burden was on plaintiffs of shewing that the measurements and quantities allowed for by the company were erroneous; held, also, that the obtaining of the certificate of the company's engineer, as the character of work done, was a condition precedent which must be performed to entitle plaintiffs to payment; held, also, that, notwithstanding the fact that the contract was put an end to by defendant, plaintiffs were still bound by its terms in arriving at a decision as to what was due them. *Sorette* v. *Nova Scotia Development Co.*, 31 N.S.R. 427.

See INSURANCE, II.

—Vente à réméré—Registry—Rights of third party—Notice.]—See SALE OF LAND, I.

(*b*) *Implying terms.*

—Exemption from taxation—Principles applicable—Ambiguity.]—A contract exempting individuals from municipal taxation must be expressed in clear and unambiguous terms, and cannot be extended by implication. If, on any fair construction of the contract, there is a reasonable doubt whether the claim to exemption exists, this doubt must be solved in favor of the State. In other words, the language used must be of such a character as, fairly interpreted, leaves no room for controversy. Hence a contract of exemption which stated that drains should not be charged to the estate of B., but that future purchasers of certain lots of the estate might be required to contribute to the cost of drains, does not exempt from assessment a purchaser of a lot not so specified in the contract, the principle that the mention of an exemption implies a rule not availing to establish an exemption from taxation. *Beauvais* v. *City of Montreal*, 14 Que. S.C. 385.

—Affirmative covenant—Implying negative.]—Where there is an affirmative covenant in an agreement, and the parties have themselves settled and set out in the contract what the defendant is not to do, no further negative covenants will be implied from the affirmative one. Order made for the delivery over by the defendant to the plaintiff of certain orders for pictures taken by defendant as agent of the plaintiff from customers under the circumstances set out in the report and for the taking of an account of the dealings between the parties. *Bentley* v. *Bentley*, 12 Man. R. 436.

(*c*) *Nature of Contract.*

—Railway—Expropriation of land—Tenants in common—Plans and books of reference—Indemnity—Registry laws.]—The provisions of the Civil Code as to the registration of real rights have no application to proceedings in matters of expropriation of lands for railway purposes under the provision of the Revised Statutes of Quebec.—Pending expropriation proceedings begun against lands held in common (*par indivis*) for the purposes of appellant's railway, the following instrument was signed and delivered to the company by six out of nine of the owners *par indivis*, viz.: "Be it known by these presents that we, the legatees Patterson of the Parish of Beauport, County of Quebec, do promise and agree that as soon as the Quebec, Montmorency and Charlevoix Railway is located through our land in Parishes of Notre-Dame des Anges, Beauport and L'Ange-Gardien, and in consideration of its being so located we will sell, bargain and transfer to the Quebec, Montmorency and Charlevoix Railway Company, for the sum of one dollar, such part of our said land as may be required for the construction and the maintenance of the said railway, and exempt the said company from all damages to the rest of the said property, and that, pending the execution of the deeds, we will permit the construction of said railway to be proceeded with over our said land, without hindrance of any kind, provided that the said railway is located to our satisfaction. As witness our hands at Quebec, this 11th day of June, in the year of Our Lord, one thousand eight hundred and eighty-six." Afterwards, the line of the railway was altered, and more than one year elapsed without the deposit of an amended plan and book of reference to shew the deviation from the line as originally located. The company, however, took possession of the land and constructed the railway across it, and in August, 1889, the same persons who had signed the above instrument granted an absolute deed of the lands to the company for a consideration of five dollars, acknowledged to have been paid, reciting therein that the said lands had "been selected and set apart by the said railway company for the ends and purposes of its railway, and being already in the possession of the said railway company since the eleventh day of June, one thousand eight hundred and

eighty-six, in virtue of a certain promise of sale *sous seing privé* by the said vendors in favour of the said company." Neither of the instruments were registered. G. purchased the New Waterford Cove property in 1889, and, after registering his deed, executed by all the owners *par indivis*, brought a petitory action to recover that part of the property taken by the railway company, alleging that the instruments mentioned constituted a donation of the lands, and did not come within the operation of Arts. 5163 and 5164 of the Revised Statutes of Quebec: —Held, that the terms of s.s. 10 of Art. 5164, R.S.Q., were sufficiently wide to include and apply to donations; that the instrument in question was not properly a donation, but a valid agreement or *accord* within the provisions of the said tenth sub-section, under onerous conditions of indemnity which appeared to have been satisfied by the company; that, as the agreement stipulated no time within which the new plan should be filed and the location appeared to have been made to the satisfaction of the required proportion of the owners, it was sufficient for the company to file the amended plan and book of reference at any time thereafter; and that, as the indemnity agreed upon by six out of nine of the owners *par indivis* had been satisfied by changing the location of the railway line as desired, the requirements of Art. 5164, R.S.Q., had been fully complied with, and the plaintiff's action could not, under the circumstances, be maintained. *Quebec, Montmorency & Charlevoix Ry. Co.* v. *Gibsone*, 29 S.C.R. 340.

VII. Duress.

—Prisoner—Intimidation—Nullity—Ratification.] —A contract will not be set aside merely because it was entered into by a prisoner, but it will if the arrest and imprisonment have been employed as a means of intimidation or constraint to procure the party's consent to its execution.—In order to avoid the contract, the menaces or other means of intimidation must have been employed by the beneficiary or some one on his behalf.—A contract cannot be attacked on the ground of violence, constraint, etc., if since they have ceased it has been approved or ratified expressly or otherwise. *Petit* v. *Martin*, 14 Que. S.C. 128.

VIII. Enforcement.

—Contract made abroad—Fraud.]—A contract which has been perfected in a foreign country may be executed and its execution enforced before the courts of this country even when one of the parties to it had, to the knowledge of the other, the intention in entering into the contract to violate our laws. —Mere knowledge by the seller of the fraudulent intention of the buyer does not vitiate the contract when the goods are sold and delivered in a foreign country. *Lebeuf* v. *Levallée*, 15 Que. S.C. 520.

—Mortgage—Indemnity in case of sale "en justice"—Sale by curator of insolvent mortgagor.]—See Mortgage, IV.

IX. Formation.

—Correspondence—Quotation of Prices—Acceptance.]—The defendants, dealers in flour, wrote to the plaintiffs, bakers, that they wished to secure their patronage as customers, and quoting prices and terms for specified kinds of flour, adding a suggestion that the plaintiffs should "use the wire to order." The plaintiffs answered by telegram that they would take two cars "at your offer of yesterday." The defendants did not deliver the flour, and the plaintiffs sued for damages for non-delivery.—Held, that there was no contract. *Harty* v. *Gooderham*, 31 U.C.Q.B. 18, distinguished. *Johnston* v. *Rogers*, 30 Ont. R. 150.

—Proposal in writing—Acceptance by parol—Evidence as to terms.]—D. delivered to H. a document containing written instructions to sell a coal mine on certain terms and a promise to pay H. a commission of five per cent. on the selling price, the commission to include all expenses. H. proceeded to sell the mine and incurred certain expenses. —Held, per Walkem, J., that evidence was admissible to shew that contemporaneously with the delivery of the document to H. he stated that the mine could not be sold at the price named, and that D. agreed to pay his expenses if a sale was not made.—Held (on new trial), per McColl, J., that such evidence was inconsistent with the written instructions, and therefore not admissible.—Held, on appeal, that the question whether the written instructions constituted the whole contract should have been submitted to the jury. *Harris* v. *Dunsmuir*, 6 B.C.R. 505.

X. Government Printing.

—Formation of contract—Powers of Queen's printer.] —On November 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 the said date. The contract was executed under the authority of 32 & 33 V., c. 7, s. 6, and on November 25th, 1879, was assigned to W., who performed all the work sent to him up to December 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 authorising 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. *The Queen* v. *Woodburn*, 29 S.C.R. 112.

XI. Illegality.

—Agreement of illegal or immoral character—Enforcement of—Costs.] — Plaintiff, her husband, L., and defendant, a solicitor, entered into an agreement, under which defendant was to commence proceedings in the name of L., against plaintiff for a divorce, on the ground of adultery with a person named. At the same time it was agreed that certain other persons, with whom plaintiff alleged that she had also committed adultery, should be threatened with legal proceedings, involving publicity and that any moneys obtained from such persons in settlement of the proceedings, should be applied in payment of the costs of the divorce proceedings, and the balance held in trust for plaintiff and L., or one of them. A considerable sum of money having been received by defendant from the persons threatened with proceedings, plaintiff sued to recover the proportion of the sum to which she claimed to be entitled. Held, that the agreement was one of an illegal or immoral character to the enforcement of which the Court would not lend its assistance. No costs were allowed to either party. *Byron* v. *Tremaine*, 31 N.S.R. 425.

—Lottery—Chance—Consideration.] — The defendants, by public advertisement, offered a piano as a prize to the person who would guess most nearly the weight of a large block of soap, exposed for that purpose at a public exhibition. Three persons were chosen to act as judges and determine the winner. It was also a condition that the participants in the contest should buy and give defendants' soap a fair trial.—Held, on demurrer, that there was a consideration for the contract.—That the contest involved skill and judgment and did not come within the meaning of a lottery.—That the general allegation of the performance of all conditions necessary to entitle the plaintiff to recover was, on demurrer, a sufficient averment of the performance of such conditions.—Where a person by public advertisement agrees, on the performance of any defined act or condition, to pay a specific sum of money, he becomes bound, on notice by any one who in fact does the act or performs the condition, provided the act or condition is not illegal. *Dunham* v. *Saint Croix Soap Mfg. Co.*, 34 N.B.R. 243.

XII. Performance.

(a) *Excuse for non-performance.*

No action lies for the non-performance of a term of a contract which term is on its face impossible of performance by any of the parties. Where, therefore, a contract was made by a company for the electric lighting of a city for a named number of nights before a fixed date at a fixed rate per light per night, there not being as many as the named number of nights before that date, and the company did not supply lights the nights that there were, and were not prevented from doing so by the city, it was held that they were not entitled to recover at the contract rate for the named number or for more than the nights actually lighted. *Stratford Gas Co.* v. *City of Stratford*, 26 Ont. App. 109.

—Impossibility of performance by act of party—Municipal corporations—Member interested in sub-contract.] — The defendant, who was a member of a municipal corporation, and who would have been disqualified, under s. 80 of the Municipal Act, R.S.O. c. 223, from entering into or being interested in a contract with the corporation, entered into a sub-contract to do the brick and mason work of a town and fire hall which was being erected for the corporation under a contract which contained a provision that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and corporation. The defendant agreed to resign his seat—though this formed no part of his written contract—which he afterwards refused to do on the ground that the corporation declined to accept him as a sub-contractor, and a resolution was passed by the corporation to that effect, whereupon the defendant refused to perform the contract: — Held, that the defendant by his omission to resign had not done all in his power to enable him to perform the contract, and was precluded thereby from setting up the resolution of the council as an answer to his non-performance, and was liable for the damages sustained by the plaintiff. *Ryan* v. *Willoughby*, 30 Ont. R. 411.

(b) *Partial performance.*

—Condition precedent—Quantum Meruit.] — Where there is a contract to do specified work for a fixed sum, with a proviso for payment of proportionate amounts, equal to 80 per cent. of this fixed sum, as the work is done and the balance of 20 per cent. in thirty days after completion and acceptance, completion is a condition precedent to the right to payment, and where the work is not completed there is no right to recover for the portion done as upon a quantum meruit. *Sherlock* v. *Powell*, 26 Ont. App. 467.

(c) *Specific performance.*

—Vendor and purchaser—Laches—Waiver.] — The purchaser under contract for sale of land is not entitled to a decree for specific performance by the vendor unless he has been prompt in the performance of the obligations devolving upon him and always ready to carry out the contract on his part within a reasonable time even though time was not of its essence; nor when he has declared his inability to perform his share of the contract.—The purchaser waives any objection to the title of the vendor if he takes possession of the property and exercises acts of

ownership by making repairs and improvements. *Wallace* v. *Hesslein*, 29 S.C.R. 171, affirming 29 N.S.R. 424.

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

—Street Railways—Contract—Running Cars—Injunction.] — The Court will not order specific performance of an agreement by an electric railway company to run its cars on certain streets at certain hours and with certain officers, as the Court cannot oversee the carrying out of the judgment if granted. Nor will the Court grant an injunction restraining the company from carrying out such an agreement to the extent to which they are willing to carry it out unless and until they carry it out *in toto*, as this would also involve the same minute supervision. *City of Kingston* v. *Kingston, Portsmouth, etc. Ry. Co.*, 25 Ont. App. 462, affirming 28 Ont. R. 399 and C.A. Dig. (1897) 77.

—Jurisdiction—Parol agreement—Conflict of evidence.]—In a suit for specific performance the evidence must satisfactorily shew that the agreement is substantially what it is alleged to be by the plaintiff. If the agreement is denied on oath by the defendant, the Court will not decree specific performance of it unless the plaintiff's evidence is so corroborated by witnesses, or by the surrounding circumstances as to leave no substantial doubt that the defendant is in error. The exercise of the jurisdiction in equity as to enforcing specific performance of agreements is not a matter of right in the party seeking relief, but of discretion in the Court to be exercised in accordance with fixed rules and principles.—In a suit for specific performance of an alleged parol agreement for the sale to the plaintiff by the defendants of a piece of land, the bill alleged the agreement to be that the plaintiff should take the land subject to a mortgage, on payment to the defendant of $100. The plaintiff's evidence proved the agreement to be that the amount payable to the defendant was to be secured to him by a second mortgage on the land. The defendant's evidence proved that the plaintiff was to pay off the mortgage then on the land, and give the defendant a mortgage for amount payable to him:—Held, that there was no concluded agreement between the parties, and that the bill should be dismissed, but, under the circumstances, without costs. *Calhoun* v. *Brewster*, 1 N.B. Eq. 529.

—Agreement to give chattel mortgage.]—Specific performance will be decreed of an agreement to give a bill of sale upon ascertained furniture sold and delivered upon credit in reliance upon such agreement. *Jones* v. *Brewer*, 1 N.B. Eq. 630.

XIII. Ratification.

—Public printing—Formation of contract—Ratification—Breach.]—On November 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 32 & 33 V., c. 7, s. 6, and on November 25th, 1879, was assigned to W. who performed all the work sent to him up to December 5th, 1884, when the term fixed by the contract expired, and for two years longer under authority of a letter from the Queen's Printer. On October 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 to December 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 other parties up to the date of said execution. 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 that W. could not allege a ratification after expressly repudiating its terms and refusing to be bound by it. *The Queen* v. *Woodburn*, 29 S.C.R. 112.

XIV. 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*, 29 S.C.R. 291, affirming 6 B.C.R. 205.

XV. Restraint of Trade.

—Injunction—Specific performance of covenant—Affirmative and negative covenants.]—Specific performance of a covenant to act as the agent of another will not be enforced. A covenant not to "handle" a certain class of goods during a specified term of years is void, as being in undue restraint of trade, there being no limitation of territory. The language was also held to be too vague and uncertain to enable the Court to order an injunction against the defendant in the terms of the covenant. *Bentley* v. *Bentley*, 12 Man. R. 436.

XVI. Revocation.

—Contract under seal—Execution by one party—Acceptance by the other party—Revocation—Damages.]—A contract sealed and delivered by one party, which is subject to the approval of the other party, cannot be revoked by the former before the latter has had a reasonable time within which to signify his assent. Nominal damages only allowed against the defaulting party under the circumstances set out in the report. *Waterous Engine Co.* v. *Pratt*, 30 Ont. R. 538.

XVII. Ticket-holder.

—Place of public amusement—Right of ticket-holders to admission—Negro holder.]—The plaintiff, a coloured man, on the 11th March, 1898, secured two seats for the following evening in what are called the orchestra chairs, in a theatre known as the Academy of Music. On the following evening he presented himself with a coloured woman, but was prevented by the ushers from occupying the seats secured, although seats in another part of the theatre were offered him. He refused the seats offered, quitted the building, and claimed damages for breach of contract. It appeared in evidence that there was no regulation known to the public excluding coloured persons from the orchestra chairs, but appellants' servants had received verbal instructions not to seat them there:—Held, that the evidence establishing that there was an unconditional contract by which two seats in the orchestra chairs had been leased to the respondent, his exclusion subsequently on the ground that he was a coloured man was a breach of the contract between the appellants and the respondent, and the judgment rendered in favour of the latter was well founded. *Sparrow* v. *Johnson*, 8 Que. Q.B. 379, affirming 15 Que. S.C. 104.

XVIII. Validity.

—Contract by company—Consent judgment—Terms on setting aside—Relief.]—Where by contract, *ex facie* legal and regular, the appellant company purported to incur liability to the respondent for railway construction in an amount which was in reality calculated to cover the amount of bonus and of price of issued shares payable by agreement between the respondent and all the shareholders of the company, irrespective of either actual or estimated cost of construction:—Held, that the contract was *ultra vires* of the company. Held, further, reversing 26 S.C.R. 221, that a consent judgment obtained on the contract declaring the respondent's lien on the company's railway and other property, the question of *ultra vires* not having been raised either in the pleadings or on the facts stated, was of no greater validity than the contract.—In a suit by the company to set aside the contract and judgment, held that they must be set aside on terms which were consented to of paying to the respondent the balance due to him for construction on a *quantum meruit*, securing the amount thereof by bonds of the company if and when issued, the whole to be taken by him subject to first and other charges in favour of sub-contractors and banks in advance to them, who had acted on the faith of the judgment to which they were not parties without notice of the illegalities of the contract. *Great North-West Central Ry. Co.* v. *Charlebois*, [1899] A.C. 114.

—Vente à réméré by judgment debtor—Inability to satisfy judgment—Fraud—Opposition.]—A contract of sale with provision for redemption (*vente à réméré*), executed by a judgment debtor, which renders him incapable of satisfying the judgment to the knowledge of the purchaser, is fraudulent and void, and cannot serve as a ground for opposition to the seizure of the property by the judgment creditor.—The expectation that the parties to the contract might have entertained that the judgment would be reversed on appeal whereby the creditor would lose her debt is not sufficient to remove the presumption established by law that the contract was fraudulent. *Francœur* v. *Francœur*, 15 Que. S.C. 527.

And see Infant.
" Sale of Goods.
" Sale of Land.

CONTRAINTE PAR CORPS.

—Slander—Amount of damages—New code of procedure (Que.)—Vested rights—Abolition of Contrainte par corps.]—Since the new Code of Procedure came into force in Quebec an arrest (*contrainte par corps*) on a judgment for slander can only be ordered when the damages awarded amount to $50; Art. 833 of the new code has been substituted for Art. 2272 C.C. In this case though the proceedings were begun before the new code came into force the plaintiff could not invoke a vested right to an arrest since the modes of executing a judgment are only derived from the law and the legislature may change or

modify them at will without regard to existing rights.—*Contrainte par corps* as it had existed up to Sept. 1st, 1897, was abolished by a special Act which came into force on that day; the abolition was made without reserve and, therefore, applied to causes pending when it took effect. *Roger* v. *Loranger*, 8 Que. Q.B. 119.

—Personal injuries—Judgment for damages—Arrest in execution—Order for arrest—Previous abandonment (cession de biens).—

See DEBTOR AND CREDITOR, II.

—Execution of judgment—Personal injuries—Damages—Costs—Cession de biens—Art. 836 C.C.P.]—See JUDGMENT, VIII.

—Application for rule—Service—Art. 837 C.C.P.—Imperative provisions.].

See PRACTICE AND PROCEDURE, LIII.

CONTRIBUTORIES.

See COMPANY, XII. (*a*).

COPYRIGHT.

—Violation of Act — Action for penalties—Parties—Crown—Amendment.]

See PARTIES, V.

CORONER.

—Post-mortem—Direction to surgeons—Impanelling of jury—County Crown Attorney—Consent—R.S.O. c. 97, s. 12 (2)—Construction.]—The wife of the plaintiff having died suddenly, the defendants, three practicing physicians and surgeons, acting under a verbal direction from a coroner for the city where the death occurred and the body lay, entered the house of the plaintiff for the purpose of making, and made there, a post-mortem examination of the dead body. The coroner had issued a warrant to impanel a jury for the purpose of holding an inquest on the body, but the warrant was afterwards withdrawn without the knowledge of the defendants. There was no consent in writing of the County Crown attorney:—Held, that the coroner, having authority to hold an inquest upon the body, and having determined that it should be held, and having begun his proceedings, had power to summon medical witnesses to attend the inquest and to direct them to hold a *post-mortem*; held, also, that no rule of law forbade the making of the *post-mortem* before the impanelling of the jury; that was a matter of procedure in the discretion of the coroner; held, also, that the meaning of s. 12 (2) of R.S.O. c. 97 was that the coroner should not, without the consent of the Crown Attorney, direct a *post-mortem* examination for the purpose of determining whether an inquest should be held, but only where the coroner had determined to hold an inquest and gave the direction as part of the proceedings incident to it; but if the provision should be read differently, it was at all events merely directory, and did not render an act done by a surgeon in good faith, under the direction of a coroner, unlawful because the coroner had neglected to obtain the prescribed consent, where the act would be lawful if the consent had been obtained. *Semble*, also, that if the verdict for the plaintiff had been allowed to stand, the amount of damages assessed, $600, was excessive. *Davidson* v. *Garrett*, 30 Ont. R. 653.

—Criminal Code, s. 687—Justice of the Peace.]—A coroner is not a justice of the peace within the meaning of s. 687 Criminal Code. *The Queen* v. *Graham*, 8 Que. Q.B. 167, 2 Can. Cr. Cas. 388.

—Coroner acting in place of sheriff—Rights and liabilities—Replevin bond.]—See REPLEVIN.

CORPORATION.

See COMPANY.
" MUNICIPAL CORPORATIONS.
" RAILWAYS AND RAILWAY COMPANIES.

COSTS.

XXIII. Taxation and Recovery.

(*a*) *Appeals from taxation.*
(*b*) *Counsel fees.*
(*c*) *Disallowance.*
(*d*) *In particular matters.*
(*e*) *Scale.*
(*f*) *Set-off.*

I. Abandonment of Action.

—Désistement—Terms — Offer to pay costs—Art. 275 C.C.P.]—An unconditional abandonment of action not containing an offer to pay costs is valid as defendant need only inscribe the cause for judgment to obtain the dismissal of the action with costs. *Brown* v. *Belleville*, 15 Que. S.C. 427.

—Delays for pleading—Art. 197 C.C.P.]—Writ was returned January 5th, and on the 10th appearance was filed by consent of plaintiff's attorney. On January 12th the latter was asked to accept a copy of the pleas to be filed later. On the 13th an abandonment was served and filed the defence only being filed on the 14th:—Held, that the six days for pleading allowed by Art. 197 C.C.P. should only be reckoned from January 10th, and that defendant was entitled to the costs and disbursements of the pleas. *Brown* v. *Belleville*, 15 Que. S.C. 576.

—Several defendants—Severance—Enquête.]—If several defendants file distinct defences, and the plaintiff desists from his action, he is bound to pay the costs of all such defences, whether separate defences were necessary or not. No *enquête* fee will be allowed if the plaintiff desists from his action after inscription, but before the trial. *Protestant Board of School Commissioners of Outremont* v. *Cook*, 2 Que. P.R. 251.

—Motion for permission to plead—Subsequent abandonment—Art. 276 C.C.P.]—If, after opposing a motion for permission to file a plea after the pleadings are closed, the plaintiff abandons his action before judgment can be given on such motion, he will be condemned to pay the costs of the motion which will be dismissed in consequence of the abandonment. *Mitchell* v. *Welsh*, 2 Que. P.R. 295.

II. Appeal as to Costs.

—Error in principle—Recovery of land—Construction of will—Improvements under mistake of title—Reference.]—The plaintiffs claimed a farm, a portion of the estate of their father, under an executory devise over to them in his will, after the life estate of their brother. The defendants were the executors of the will of the brother's grantee, and were in possession of the farm, asserting that their grantor's estate was in fee. The plaintiffs claimed, in the alternative, as two of the heirs-at-law of their brother, upon the ground that the conveyance to the defendants' testator was void for mental incapacity and fraud. The plaintiffs succeeded upon their first contention, and were awarded possession of the farm, subject to payment for the defendants' improvements, less the rents received by them:—Held, that, as the whole estate of the original testator was not before the Court, nor the executors, nor all the persons representing that estate, it was impossible to give costs out of it in the ordinary sense, and an appeal lay from the judgment of the High Court ordering the costs to be paid out of the farm in question, which was wrong in principle. The costs should be disposed of, in the manner mentioned in the judgment, as in an ordinary action for the recovery of land, in which the plaintiffs had succeeded, subject to a claim for and a balance found due to the defendants for improvements under mistake of title. *Crawford* v. *Broddy*, 18 Ont. Pr. 233.

—Discretion of trial judge—Disputed accounts—Appeal.]—In a suit tried without a jury by the judge of the county court for N.S. district No. 4, the only question in dispute was the settlement of mutual accounts. The learned judge found certain items in favour of each party, the final result being judgment for the defendant for the balance found in his favour. No costs were given to either party, 1st, on the ground of the disputed items, and 2nd, on the ground that plaintiff had ample reason for instituting the proceeding, having been led by defendant's conduct to believe there was a balance due him:—Held, (Ritchie, J., and Graham, E. J., dissenting), that the reasons of the trial judge for withholding costs were reviewable on appeal. Held, also, that, the case was one in which the ordinary rule should prevail, and that defendant, having succeeded as to the balance of the account, was entitled to his costs. *Townshend* v. *Smith*, 32 N.S.R. 305.

—Statement of claim—Amendment—Capacity of parties—Plaintiff—Costs.]—See Pleading, I.

III. Dismissal of Action.

—Second action for same cause—Payment of costs of former action.]—See Action, IX.

IV. Distraction of Costs.

—Execution by attorney—Opposition—Contest by plaintiff.]—Plaintiff's attorney having obtained distraction of the costs against the defendant caused a writ of execution to be issued against the latter in his own name. Defendant took an opposition to the seizure, and plaintiff by the same attorney, contested the opposition:—Held, that the execution having been issued in the name of the attorney, the plaintiff was no party to the seizure, and could not, even by means of the same attorney, contest defendant's opposition. *Cadieux* v. *Coursol*, 14 Que. S.C. 436.

—Judgment for debt and costs—Execution.]—A judgment for debt and costs may be executed without the consent of the attorney who obtained it, and in whose favour distraction of costs was granted. *Wilson* v. *Lemonde*, 2 Que. P.R. 156.

V. Giving and Withholding.

(a) *Conduct of Parties.*

—Foreclosure—Judgment creditor—Disclaimer.]—Where a judgment creditor, having registered a memorial of his judgment, is made a party to a suit for the foreclosure of a mortgage given previously by the judgment debtor, and disclaims, he is not entitled to costs on the dismissal of the bill as against him. *Nicholson* v. *Reid*, 1 N.B. Eq. 607.

—Writ of summons—Special indorsement—Nullity—Judgment—Abandonment of action—Joint contractors—Release of some after judgment.]—

See Practice and Procedure, XXXVIII.

(b) *Irregular procedure.*

—Relief against co-defendant—Striking out—Costs—Pleading to counterclaim—Waiver.]—One of the defendants, in an action brought to recover possession of land and to set aside a conveyance of the land from him to his co-defendant, delivered with his statement of defence a counterclaim against his co-defendant for relief upon the covenants contained in the conveyance attacked and in a prior mortgage deed, but sought no relief against the plaintiff in that regard, and did not serve a third party notice upon his co-defendant. The latter pleaded to the counterclaim, but at the trial moved to strike it out, and, after an expression of opinion from the trial Judge, the counterclaiming defendant submitted to have it struck out:—Held, that the co-defendant was entitled as against the counterclaiming defendant to such costs as he would have been entitled to upon a successful motion to strike out the counterclaim. Held, also, that the fact of his having pleaded to the counterclaim did not militate against his rights. *Cope* v. *Crichton*, 18 Ont. Pr. 462.

—Bar discipline—Notes of evidence—Prejudice to accused.]—In proceedings by the Council of the bar of Montreal against a member, for unprofessional conduct:—Held, on application for a writ of prohibition, that the Council not having taken notes of the evidence adduced, as it should have done, and thereby deprived the accused member of the benefit of an appeal to the general council, which the law would have given him, he should not have been condemned to pay the costs of the proceedings. *Bar of Montreal* v. *Honan*, 8 Que. Q.B. 26.

—Costs of irregular counterclaim.]

See Pleading, IV.

(c) *Omission in procedure.*

—Absent plaintiff—Procuration.]—The plaintiff absent from the province who fails to file a procuration with the return of his writ must pay in any event the costs of a motion to have the same filed. *Glines* v. *Truax*, 2 Que. P.R. 291.

(d) *Special proceedings.*

—Slander—21 Jac. I., c. 16—45 V., c. 9, s. 7 (N.B.).]—The statute 21 Jac. I., c. 16, is in force in New Brunswick; therefore a plaintiff in an action of slander, who recovered damages in an amount less than forty shillings, was not allowed costs. *Gallagher* v. *O'Neill*, 34 N.B.R. 194.

(e) *Unnecessary proceedings.*

—Attachment after judgment—Quashing Writ—Mode of proceeding—Motion—Costs.]

See Practice and Procedure, IX.

—Succession duties—Non-payment—Possession of estate—Petition for—Trust.]

See Trusts and Trustees, IX.

VI. Imprisonment for Costs.

—Municipal tax—By-law—Penalty—Fine and imprisonment—Discharge.]—When a municipal by-law imposing a tax on laundries provides for punishment by a fine of $40, without mentioning costs, for every infraction thereof, and directs that in default of payment of the fine, also without mention of costs, the delinquent shall be imprisoned for two months, such imprisonment to cease upon payment of the fine *and the costs*, the Recorder cannot condemn the delinquent to payment of costs, nor order him to pay them with the fine to avoid imprisonment or obtain his discharge.—As Art. 141 of the former charter of Montreal provides that imprisonment of a delinquent shall cease from the time the *fine* is paid without mention of costs payment of costs cannot be exacted as a condition of the cessation of the imprisonment.—It cannot be exacted, as a condition of discharge from imprisonment, that the delinquent shall pay the expenses of carrying him to jail, as the statutes governing the city of Montreal, and the by-law in question do not authorize their imposition, and when the Recorder is empowered to impose these costs he must himself fix the amount. *Lee* v. *DeMontigny*, 15 Que. S.C. 607.

VII. Indulgence.

—Judgment of distribution—Opposition afin de conserver—Permission to file after delay.]—The creditor who, after the homologation of a judgment of distribution, has obtained permission to file his opposition *afin de conserver*, which he had neglected to file in proper time, should pay the costs of the new judgment of distribution rendered necessary for the collocation of his claim. *Chatillon dit Godin* v. *Lauthier*, 14 Que. S.C. 521.

—Motion to amend.]

See Practice and Procedure, VI.

VIII. In Particular Matters and by and against Particular Persons.

—Bankruptcy and insolvency—Assignee—Costs of action brought by—Remuneration and disbursements of.]—An assignee for the benefit

of creditors, under the Assignments Act, cannot charge creditors personally with the costs of an action brought by him on behalf of the insolvent estate, unless upon a direct or implied promise of indemnity, but must look to the assets of the estate; and so, too, with regard to his remuneration for and disbursements in winding up the estate. *Johnston* v. *Dulmage*, 30 Ont. R. 233.

—Appeal to County Council—Dismissal with costs—Party to get costs not specified.]—Where an appeal to a County Council under the Municipal Code is dismissed with costs, and it is not stated in whose favour the costs are awarded, it must be deemed that they are granted to the party who succeeds; that is, in this case the local corporation whose judgment was appealed from. *County of Drummond* v. *Laferté*, 14 Que. S.C. 79.

—Husband and wife—Joint action—Inscription in law.]—An action for bodily injury to a wife, assumed to be common as to property, belongs to the community, and must be brought by the husband alone. The costs of an inscription in law against the action of the wife as a joint plaintiff will be those of a demurrer only. *Tondreau* v. *Semple*, 2 Que. P.R. 296.

—Habeas corpus proceedings.]—Per Drake, J.:—The Court has power, under the B.C. Supreme Court Act, s. 10, and Rule 751, to award costs upon a rule *nisi* for habeas corpus. *Re Quai Shing*, 6 B.C.R. 86.

—Deduction of costs of proceedings from award.]

See Arbitration and Award, III.

—Lost note—Indemnity—Costs of defence—Master.]

See Bills of Exchange and Promissory Notes, X.

—Lunacy—Inquisition terminated by death before verdict—Costs.]—See Lunacy.

—Costs in certiorari proceedings.]

See Practice and Procedure, XI.

—Order for payment of costs—Extending time for—Dismissal of action in default.]

See Practice and Procedure, III.

—Ship under seizure—Marshal's fees—Taxation.]

See Shipping, VII.

—Compromise of action by client—How solicitor affected as to costs.]—See Solicitor.

—Certiorari—Security.]

See hereunder, XVI.

IX. Joint and Several Liability.

—Bank—Société en commandite—Director—Joint action for entire debt—Separate defence.]—A director (*directeur gérant*) of the Banque du Peuple, which is a limited partnership (*société en commandite*), sued jointly and severally with the bank for transactions in the ordinary course of its affairs, having always the right to defend himself separately, can charge the bank with payment of the costs of such separate defence. *Préfontaine* v. *Banque du Peuple*, 14 Que. S.C. 515.

X. Joint Defence.

—Several defendants—Partage.]—In an action, *en partage et licitation*, where the defendants, seven in number, make one and the same defence, which was dismissed, the plaintiff is entitled to a single bill of costs only, to be executed against each defendant for one-seventh. *Boisseau* v. *Williams*, 2 Que. P.R. 134.

—Subrogation—Payment by one defendant.]—A joint co-defendant who has paid the amount of the judgment in full is subrogated to plaintiff's right for one-half of this amount, but cannot, *de plano*, claim one-half of the costs paid by him to the plaintiff. *Bury* v. *Lynch*, 2 Que. P.R. 239.

XI. Motion for Particulars.

—Costs in the cause.]—As a general rule the costs of a motion for particulars should follow the issue of the action. *Luneau* v. *Juneau*, 2 Que. P.R. 74.

XII. Privilege for Costs.

—Saisie-gagerie—Seizure useful to plaintiff.]—The privilege for law costs cannot be opposed to a creditor invested with a special right and in regard to whom the costs were uselessly incurred. So, where the plaintiff issued a *saisie-gagerie* and the opposant a seizure before judgment of the same effects on the same day, but the seizure before judgment was made first, and it appeared that the goods seized were at the time in a building owned by the lessor and in his actual possession (the defendant Radford having absconded), and the amount levied was insufficient to pay the plaintiff's claim, it was held that the opposant was not entitled to a privilege for law costs, his seizure not being useful to the plaintiff. *Imperial Ins. Co.* v. *Radford*, 15 Que. S.C. 591.

XIII. Proceeding for Costs Only.

—Attorney's costs—Affidavit—Copy of taxed bill.]—An attorney, in order to obtain judgment for his costs, should, with his affidavit, file a copy of the taxed bill or the record in the cause in which the costs are claimed, a party being obliged to furnish the best possible proof. *Pinault* v. *Gagnon*, 14 Que. S.C. 523.

—Interdit—Review—Abandonment—Art. 223 C.C.P.]—An interdit for insanity who has proceeded in review from the judgment of interdiction is incapable of abandoning such proceedings, and his abandonment being a nullity, his attorney cannot intervene to continue the cause for his costs. *Léveillé* v. *Laliberté*, 5 Rev. de Jur. 76.

XIV. Proceedings in Review.

—Inscription in review—Principal demand and incidental demand.]—When by a single inscription in review a party has asked for the review of a judgment rendered at one time upon a principal demand and upon an incidental demand, the attorney of the adverse party has a right only to the fee of a single contestation in review. *Legault* v. *Lallemand*, 14 Que. S.C. 149.

XV. Reprise d'Instance.

—Petition—Inscription en droit.]—A petition for *reprise d'instance* contested is an action, and the party who procures the dismissal of such a petition on *inscription en droit* has a right to the fees prescribed for an action before inscription and to the disbursements on a defence. *Riddell* v. *School Commissioners of La Cote St. Louis*, 2 Que. P.R. 57.

XVI. Security for Costs.

—Appeal—Court of Appeal (Ont.)—Con. Rule 826.]—Con. Rule 826 (Ont.) is applicable to an appeal under s. 39 (2) of the Mechanics' Lien Act, R.S.O., c. 153, by the respondent in the Court below from the order of a Divisional Court reversing the judgment upon the trial of a mechanic's lien action, where the amount in question is more than $100, and not more than $200; and therefore security for the costs of such an appeal must be given, unless otherwise ordered. *Sherlock* v. *Powell*, 18 Ont. Pr. 312.

— Application for, after judgment — Refusal — Appeal to Court of Appeal.]—Where the judgment of the High Court is against a defendant, and he is appealing to the Court of Appeal, he is not entitled to an order requiring the plaintiff to give security for costs. Where the defendants would have been entitled to such an order at the commencement of the action, but did not take it because they feared that it would be set aside owing to the plaintiff, though resident out of the jurisdiction, owning property within it, an application after judgment, upon the ground that the plaintiff had ceased to own property within the jurisdiction, was refused by a Judge of the Court of Appeal. *Exchange Bank* v. *Barnes*, 11 Ont. Pr. 11, followed. *Small* v. *Henderson*, 18 Ont. Pr. 314.

—Dispensing with security — Poverty of appellants — Ejectment — Claim for improvements — Mesne profits—Mortgage.]—Upon an appeal by the defendants to the Court of Appeal from an order of a Divisional Court reversing the judgment at the trial and ordering judgment to be entered for the plaintiffs for possession of land with costs:—Held, that the fact that the appellants had no means or money or resources other than the land in question, and were unable to procure sureties, was not a ground for dispensing with security for costs of the appeal. If the defendants had a lien on the land for a sum exceeding $400 for improvements made by them, in the belief that the land was their own, security might be dispensed with or the lien charged by way of security. But in this case the plaintiffs would be entitled to mesne profits as against the improvements, and the defendants had mortgaged the land for the money laid out, and the lien, if any, was the mortgagee's. *Thuresson* v. *Thuresson*, 18 Ont. Pr. 414.

—Residence out of Ontario—"Ordinarily resident"—Ont. Rule 1198 (b)—Discretion.]—It is not a ground for refusing to order a plaintiff resident out of the jurisdiction to give security for the defendant's costs, that the defendant himself resides out of the jurisdiction. Rule 1198 provides that security for costs may be ordered, "(*b*) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario":—Held, that these words refer to a person who, under ordinary conditions or circumstances, is habitually present in some country or place out of Ontario; and that a person who has no home, and whose calling causes him to be as much in Ontario as elsewhere, cannot be said to come within this branch of the Rule. The discretion which the Court has in making or withholding an order for security for costs should be exercised against making on order which would shut the doors of the Court against a plaintiff. *Denier* v. *Marks*, 18 Ont. Pr. 465.

— Appeal — Several respondents — Consolidation.]—In expropriation proceedings against twenty-eight proprietors a demand for removal of the arbitrator of the proprietors was made in each case, but the causes were consolidated by consent before hearing and the demands were dismissed by one and the same judgment of a Judge in Chambers:—Held, that on appeal from such judgment a single security covering the costs and damages which each respondent may suffer, is sufficient. *Richelieu East Valley Ry. Co.* v. *Menard*, 7 Que. Q.B. 486.

—Temporary absence from domicile.]—A person who has his home and domicile in the district of Montreal, cannot be held to have changed his residence by reason of the fact that he is employed as a waiter on a railway dining-car temporarily running in the North-West Territories, and he is not obliged to give security for costs. *McGoun* v. *Morrison*, 15 Que. S.C. 32.

—Bond—Justification.]—When a security bond is given for costs of suit, it is presumed by law that the party swearing to his sufficiency does so *pour les fins du procès*, and that such sufficiency must be beyond legal exemptions. Such sufficiency means that he is in such a position financially that proceedings may be taken against him, effectively, to recover the amount of such bond. *Lalande* v. *Campeau*, 5 Rev. de Jur. 438.

—Motion for security—When to be made—Joint and several plaintiffs—Non-resident.]—A motion for security for costs and power of attorney

may be made after a motion of the nature of an exception to the form, based upon the fact that the domicile of one of the plaintiffs is not stated, so long as both motions are made within the delay required for preliminary exceptions, and presented at the same time.—In an action taken by a dissolved firm of advocates, if one of the plaintiffs is a non-resident, he will be bound to give security for costs and to file a power of attorney.—If a motion for security for costs is contested, and afterwards granted, the costs thereof will be against the plaintiff. *Taylor* v. *Lewis*, 2 Que. P.R. 187.

—Certiorari.]—In the absence of a rule of practice providing therefor, the applicant for a writ of *certiorari* cannot be compelled to give security for costs. *Desjardins* v. *Lauzon*, 2 Que. P.R. 192.

—Company—Contributory—Foreign order—Enforcement—Condemnation—Abandonment.]—If an application is made to have declared executory the order of a foreign Court declaring respondent a contributory of a company, and for a condemnation of respondent for the amount of his stock, the latter can claim security for costs; and if on the motion for security the claim for condemnation is abandoned, respondent on withdrawing his motion is entitled to the costs of it against the applicant. *Re Ontario Express and Transportation Co., Stephens* v. *Renouf*, 2 Que. P.R. 226.

—Tiers-saisi—Declaration—Contestation.]—A plaintiff residing in the United States, who contests the declaration of a *tiers-saisi*, must give security for the costs. *Sloman* v. *Wynne*, 5 Rev. Leg. N.S. 48.

—Appeal to Supreme Court—Retaining money in Court paid in by successful party.]—A plaintiff who has obtained judgment in his favour, which has been affirmed on appeal to the Full Court, is entitled to have paid out to him the money he had paid into Court as security for costs, notwithstanding an appeal by defendant to the Supreme Court of Canada: *Hamill* v. *Lilley*, 56 L.T.N.S. 620, and *Marsh* v. *Webb*, 15 Ont. Pr. 64, followed; *The Agricultural Ins. Co.* v. *Sargent*, 16 Ont. Pr. 397, distinguished; *Day* v. *Rutledge*, 12 Man. R. 309.

—Appeal from County Court—Ontario Divisional Court—Security.—See APPEAL, XI. (*d*).

—Deposit in review—Amount in controversy—Art. 1196 C.C.P.]—See APPEAL, X.

—Municipal election—Contestation—Security for fixed sum.]

See MUNICIPAL CORPORATIONS, XVII.

—Qui tam action—Motion for security—Deposit—Arts. 165, 177, 180, 181 C.C.P.]

See PRACTICE AND PROCEDURE, XLIX.

—Action by company—Description of plaintiff.]

See PRACTICE AND PROCEDURE, LXII.

—Plaintiff out of jurisdiction—Motion for security—Affidavit—Delay—Deposit—Art. 164 C.C.P.]

See PRACTICE AND PROCEDURE, XL.

And see APPEAL, X.

XVII. SEPARATE DEFENCE.

—Separate appearance and pleas—Common enquête.]—In a case where the *enquête* is common, but the parties have appeared and pleaded by different attorneys, the attorneys of each defendant who has assisted and cross-examined the witnesses and gained his cause by following his own pleadings, has a right to his fees of the *enquête* and cross-examination. *Castonguay* v. *Savoie*, 15 Que. S.C. 379.

XVIII. SETTLEMENT OF ACTION.

—Settlement between parties—Costs of attorneys—Inscription.]—A case cannot be inscribed for *enquête* and merits after the parties have settled it, even if the said settlement makes no mention of costs.—*Quære* whether the attorney can then proceed for his costs. *Delaney* v. *Lionais*, 2 Que. P.R. 215.

XIX. SEVERANCE.

—Joint action—Desistment by one plaintiff.]—One of two plaintiffs who desists from his action as to himself is responsible only for one-half of the costs of the action up to date. *Coallier* v. *Filiatrault*, 2 Que. P.R. 220.

XX. SOLICITOR AND CLIENT.

—Exchequer Court action—Solicitor and client—Agreement for compensation—Champerty.]—Per Moss and Lister, JJ.A. A solicitor of the Supreme Court of Judicature for Ontario who as such does business in carrying on proceedings for a client in the Exchequer Court of Canada, is subject to the provisions of the Solicitors' Act with regard to delivery and taxation of his bill of fees, charges or disbursements in respect of such business. *O'Conner* v. *Gemmill*, 26 Ont. App. 27, reversing, *quoad hoc*, 29 Ont. R. 47, and C.A. Dig. (1898), 433.

—Taxation of costs against client—Scale of costs—Ascertainment of amount—Solicitor's knowledge of facts.]—On an appeal by the client from a local Master's taxation, as between solicitor and client, of the solicitor's bill in an action against a bank, which was dismissed, and in which the real claim, if any, was on a deposit receipt, with interest amounting to $355, or the moneys secured thereby, alleged to belong to the plaintiff as administratrix, and in which action the facts, as set out in the report, only came to the knowledge of the solicitor and client after the action was brought, there being sufficient room for doubt whether a claim could be ascertained, after the death of the creditor, by the signature of the debtor, to warrant the bringing of the action in the High Court.—Held, that the solicitor was entitled to High Court costs. *Re Jackson, a Solicitor*, 18 Ont. Pr. 326.

—**Solicitor's costs—Action for—Interest—Art. 556 C.C.P.**]—Interest on costs due by a client to his attorney will run only from the date of the judgment in an action by the attorney to recover such costs. *Saint-Pierre* v. *Chartrand*, 2 Que. P.R. 290.

—**Non-delivery of Bill—Payment.**]

See SOLICITOR.

—**Solicitor's lien for costs.**]

See hereunder, XXIII. (*f*).

XXI. STAYING PROCEEDINGS.

—**Second action—Arts. 177, 278 C.C.P.**]—An action for damages was brought against B., sr., but served on his son, B., jr., who was intended to be the defendant. Such action having been dismissed with costs a second action for the same cause was taken against B., jr.:—Held that the latter action would not be stayed until the costs of the former were paid. *Girard* v. *Brais*, 2 Que. P.R. 172.

XXII. TARIFF.

—**Abandonment of action.**]—If the plaintiff abandons an action after signification of a motion in the nature of an exception to the form with the deposit required by law, but before such motion is presented to the Court, Art. 6 of the tariff should be applied for the appearance and Art. 23 for the fee (*honoraire*) Art. 13 having no application.—The exception to the form will be considered dismissed and the tariff governing this matter will be that for causes of the second class in the Superior Court. *Maranda* v. *Corporation of Lévis*, 2 Que. P.R. 151.

—**Contested action—Arts. 7, 11 of tariff.**]—An action is deemed to be contested for purposes of the tariff, after the filing of a motion for security for costs and procuration, and if it is then discontinued Art. 7 of the tariff applies to it. *Robertson* v. *Waterbury*, 2 Que. P. R. 152.

—**Allegation in plea—Motion to reject—Art. 23 of tariff.**]—If a motion to reject an allegation in a plea, in an action of the second class, is dismissed, the defendant is entitled to the fee allowed to a defendant by Art. 23 of the tariff on an exception to the form rejected in an action of this class.—The word "defendant" in said Art. 23 means the party proceeding by exception to the form whatever may be his position in the cause. *Harvey* v. *Mowat*, 2 Que. P.R. 228.

—**Review from Circuit Court—Tariff—Opposition à fin de distraire.**]—Art. 16 of the tariff of the Circuit Court only applies to that Court and not to proceedings in the Court of Review on appeal from judgments thereof; therefore if there be a contestation on an opposition in which the value of the movables is to be established the costs in review will be those of an action for the value of those movables even though such value may exceed the amount originally sued for. *Constant* v. *Dewitt*, 2 Que. P.R. 241.

XXIII. TAXATION AND RECOVERY OF.

(*a*) *Appeals from Taxation.*

—**Taxation—Counsel fee on reference for trial—Advising on evidence—Appeal and cross-appeal from report—Copy of evidence.**]—An action by an architect to recover $600 for professional services was by consent referred for trial to an official referee, who reported that the plaintiff was entitled to recover $397. The defendant had before action tendered $325, and had paid that amount into Court with his defence. The defendant appealed from the report, and the plaintiff also appealed, after the defendant's appeal had been set down. Both appeals were dismissed with costs. A further appeal by the defendant to the Court of Appeal was also dismissed:—Held, upon appeal from taxation of costs, that the plaintiff was entitled to tax a counsel fee upon the trial before the referee, the amount of which would not be reviewed, and also a fee for counsel advising on evidence. *Re Robinson*, 16 Ont. Pr. 423, distinguished; held, also, that the defendant was not entitled to tax as part of his costs of the plaintiff's appeal from the report the amount paid for a copy of the evidence taken before the referee, which was required by the defendant for his own appeal. *Denison* v. *Woods*, 18 Ont. Pr. 328.

—**Several defendants—Separate pleas—Honoraire d'enquête.**]—Upon contest of the taxation of a bill of costs, if several defendants have pleaded separately only a single *enquête* fee (*honoraire d'enquête*) will be allowed. *Rochette* v. *Deltorelli*, 14 Que. S.C. 9.

—**Taxation against witness—Reviewed in Chambers—Arts. 52 and 72 C.C.P.**]—There is no appeal from the review by a Judge in Chambers of taxation of costs against a witness as it would not, under Art. 52 C.C.P. be appealable if the decision had been given by the Superior Court. *Bélanger* v. *Corporation of Montmagny*, 15 Que. S.C. 378.

(*b*) *Counsel Fees.*

—**Council fees—Change in Ont. tariff.**]—An appeal was heard in 1894, but the costs thereof awarded to one party against the other were not taxed until 1899:—Held, that the counsel fees on the argument must be taxed in accordance with the tariff in force in 1894, notwithstanding the provisions of Rules 2 and 1178, and the alteration made in the tariff as to such counsel fees: *cf.* item 155 of tariff A. appended to the Consolidated Rules of 1888 with item 149 of tariff A. appended to Rules of 1897. *Delap* v. *Charlebois*, 18 Ont. Pr. 417.

(*c*) *Disallowance.*

—**Adjournment of hearing—Tariff—Arts. 48 and 49.**]—When the hearing upon a defence, a motion, a petition or an incidental proceeding is adjourned by consent of both parties the attorneys cannot claim for such adjourn-

ment the fee allowed by Art. 49 of the tariff. The words "the party obliged to proceed not being ready, to the adverse party $1" in Art. 48 should be supplied in the interpretation of Art. 49. *Marieu* v. *Herot*, 15 Que. S.C. 428.

(*d*) *In Particular Matters.*

— Railway company — Possessory action — Damages.]—As the action in this case was of a possessory character the full costs were granted, though the amount of damages proved and allowed was inferior to that claimed by the action. *Robitaille* v. *Canadian Pacific Ry. Co.*, 15 Que. S.C. 246.

—Cession de biens—Costs against curator—Recovery—Saisie-arrêt.]—The insolvent and his attorney, creditors for costs against the curator to the abandonment (*cession de biens*) cannot attach (*saisir-arrêter*) debts due by the insolvent's debtors but should apply to the judge for an order directing the curator, under penalty for contempt of court, to pay these costs as expenses of the administration provided he has sufficient funds on hand. *Daneose* v. *Bissonnette*, 15 Que. S.C. 461.

(*e*) *Scale.*

—Ascertainment of amount—County Courts Acts, R.S.O., c. 55, s. 23, (2)—Contract.]—The defendant employed the plaintiffs as his brokers to sell on his account 200 shares of a certain stock at a named price, the plaintiffs undertaking that in the event of loss the defendant's liability should not exceed $200. The contract involved the making by the plaintiffs of a contract for the future delivery of the shares at the price named, and their acquiring the stock when it became necessary by the rules of the exchange to complete the transaction. In an action upon this contract the plaintiffs recovered $200 and interest:—Held, (Falconbridge, J., dissenting,) that the amount of $200 recovered was ascertained by the act of the parties within the meaning of s. 23 (2) of the County Courts Act, R.S.O., c. 55, and therefore recoverable in a County Court. *Thompson* v. *Pearson*, 18 Ont. Pr. 420, reversing 18 Ont. Pr. 308.

—Declaration of tiers-saisi—Contestation—Class of costs.]—It is the amount stated upon the writ of *saisie-arrêt* which must determine the class of the costs to be taxed in the case of a contestation of the declaration of the *tiers-saisi* and not the amount which the latter acknowledges that he owes. *Banque Jacques Cartier* v. *Morin*, 14 Que. S.C. 96.

—Review—Amount in controversy—Attorney's fee.]—When the defendant, sued for an amount exceeding $400 and condemned to pay a smaller sum, inscribes in review from such judgment, the amount in controversy before the Court of Review is less than $400 and therefore the plaintiff's attorney should be taxed according to the amount of the judgment. *Mallett* v. *Martineau*, 15 Que. S.C. 240.

—Saisie-arrêt after judgment—Contestation.]—Judgment having been recovered for $500, a *saisie-arrêt* was issued for a balance due thereon against moneys in the hands of a third person. On contestation, the *saisie-arrêt* was dismissed with costs, which were taxed by the prothonotary, as in an action of the 4th class in the Superior Court. On review, a Judge in Chambers reduced the amount, holding that the taxation should have followed the 1st class of actions in the Circuit Court. *Lamarche* v. *Bhérer*, 2 Que. P.R. 38.

—Aliments—Arts. 551 C.C.P.]—If an alimentary allowance of $100 is granted by the Court in virtue of a deed of donation *a titre onéreux* equivalent to a sale, the costs of the plaintiff will be taxed as in a cause in the Superior Court according to the amount recovered, the provisions of Art. 551 C.C.P. not applying in such case. *D'Auteuil* v. *Maltais*, 2 Que. P.R. 79.

—Class of action.]—The costs of an action for $200, with interest from the date of service of process, will be taxed as upon an action to recover a sum between $200 and $400. *Taché* v. *Evans*, 2 Que. P.R. 119.

—Motion for particulars—Arts. 23 and 28 of tariff.]—A motion for particulars is not a preliminary exception, and should be taxed as a common motion, even if accompanied by a deposit by the party presenting it without success. *Larivé* v. *St. Jacques*, 2 Que. P.R. 160.

—Municipal Council—Confirmation of electoral list—60 V., c. 21, s. 35 (Q.).]—The costs of a petition to the Superior Court, on appeal from the decision of a Municipal Council confirming an electoral list, are those of an action of the 4th class in the Superior Court. *Bourbonnais* v. *Corporation of Coteau Landing*, 2 Que. P.R. 231.

—Admission of part of claim—Arts. 55 and 125 of tariff.]—The costs of contestation of a claim of which part is admitted follow the amount contested, and not the total amount claimed. *In re General Printing Co. of Canada*, 2 Que. P.R. 243.

—Municipal corporation — Procès-verbal — Petition to quash—Art. 100 M.C.—56 V., c. 43, s. 1 (P.Q.).]—Notwithstanding the amendment to Art. 100 M.C., by 56 V., c. 43, s. 1, the costs of a petition to quash a *procès-verbal*, alleging that the municipal council has not only acted illegally, but has exceeded powers, should be taxed as in an action of the fourth class in the Superior Court unless there are special circumstances. *Durault* v. *Township of Tingwick*, 2 Que. P.R. 250.

—Equity fees—C.S.N.B. c. 119 — 60 V., c. 24 (N.B.).]—The provision in the table of fees of the Supreme Court in Equity, c. 119, C.S., that for services not therein provided for, the fees are to be those allowed on the common law side of the Supreme Court, applies to

the table of fees in the Supreme Court Act, 60 V., c. 24. *McPherson* v. *Glasier*, 1 N.B. Eq. 649.

—Scale of costs—Practice.]—On an application for a direction to the master as to the scale on which the costs of an action in the Queen's Bench under the former practice should be taxed, so far as the record shewed the action appeared to be within the jurisdiction of the County Court and no certificate for costs on the Queen's Bench scale had been granted by the trial Judge, but plaintiff contended that the evidence shewed that the action was really one for the balance of an unsettled account exceeding in the whole $400, and therefore beyond the jurisdiction of a County Court:—Held, that, in the absence of such a certificate, the record alone and not the evidence should be looked at, and that, under s. 62 of the A. J. Act, R.S.M., c. 1, only County Court costs should be allowed to the plaintiff, and the defendant was entitled to set off the difference in his costs of defence between the Queen's Bench and County Court scales. *Miller* v. *Beaver Mutual Fire Ins. Co.*, 15 U.C.C.P. 75, followed. *Allan* v. *Clougher*, 12 Man. R. 325.

(b) Set-off.

—Solicitor's lien—Prejudice of—Probable source of payment.]—The plaintiffs, having recovered judgments for large sums against the defendants, sought to set off such sums, *pro tanto*, against certain costs adjudged to be paid by the plaintiffs to the defendants, but the solicitors for the defendants asserted a lien for their costs upon the judgment for these costs recovered by their clients against the plaintiffs. The defendants themselves were worthless, but there was another source from which it was probable that the defendants' solicitors would obtain payment of their costs:—Held, that this was not enough; if the solicitors had a certainty of being able to recover their costs from another source, the set-off could be ordered, because the lien would then be unnecessary; but it being merely a probability, the set-off could not be ordered without its operating to the prejudice of the solicitor's lien, for, should that source fail, the lien could not be replaced; and therefore, under Rule 1165, the set-off should not be ordered. *Molson's Bank* v. *Cooper*, 18 Ont. Pr. 396.

—Interlocutory Costs—Solicitor's lien—Ont. Rule 1165—Order for set-off.]—The costs of a motion, and appeals following, to discharge the defendant out of custody under an order for arrest before judgment, are properly interlocutory costs, though partly incurred after judgment; and where such costs are awarded to the defendant, they ought to be set off against the judgment which the plaintiff has obtained against the defendant in the action, and which the defendant is unable to pay. As against such a set-off, the defendant's solicitor has no lien on the costs which the plaintiff has been ordered to pay, and such costs may be ordered to be set off or deducted, as provided in Rule 1165. In this case the order allowing the defendant costs was not made until after judgment, and therefore an application to the Court for a direction to set off was necessary; had the order been made before judgment, the taxing officer would have made the deduction. *Elgie* v. *Butt*, 18 Ont. Pr. 469.

And see LIEN, SOLICITOR.

COUNSEL.

—Solicitor—Retainer of counsel by—Authority—Costs.]—Defendant retained H. to act for him in proceedings instituted before justices of the peace against defendant and others for a violation of the Customs Act. After an appeal had been perfected from the justices to the County Court, H., who had no authority from defendant for that purpose, retained plaintiff to act as counsel on the appeal. Plaintiff admitted that he never had any dealings with defendant, directly or by letter, and that no one but H. retained him to act for defendant:—Held, affirming the judgment of the County Court Judge, and dismissing plaintiff's appeal with costs, that the employment of plaintiff by H. was a delegation of duty which H. himself could perform, and for which he alone was personally liable. *Quære*, in any case, whether plaintiff could recover for such services as those claimed for without taxation either before or at the trial. *Hearn* v. *McNeil*, 32 N.S.R. 210.

—Taxation of counsel fee—Advising on evidence.]
See COSTS, XXIII. (*b*).

—Absence at trial—Judgment by default—Requête Civile—Art. 1177 C.C.]
See JUDGMENT, XV.

COUNTER-CLAIM.

See PLEADING, IV.

COUNTY COUNCIL.

—Watercourse—Procès-verbal—Homologation—Jurisdiction—Appeal to Circuit Court—Affluent—Notice—Nullity—Arts. 16, 758, 761, 878, 886, M.C.]—See MUNICIPAL CORPORATIONS, VII.

COUNTY COURTS.

—Counter-claim—Set off—R.S.O. c. 55, s. 28, 29.]—In an action in a County Court to recover an amount due for salary and travelling expenses, there was a counter-claim for advances made to the plaintiff. The plaintiff recovered $308.55, and the amount found to be due under the counter-claim was $1,169.54, but the Judge allowed only $200 to be set off:—Held, that under secs. 28 and 29 of the County Courts Act, R.S.O. c. 55. the defendants were entitled to judgment on the

counter-claim to the full amount of the plaintiff's claim. *Wallace* v. *People's Life Insurance Co.*, 30 Ont. R. 438.

—**Injunction—Injury or threatened injury to goods—Specific Damages.**]—Under the Judicature Act, R.S.O. c. 51, s. 57, s.s. 4, and the County Courts Act, R.S.O. c. 55, s. 23, s.s. 11, when a cause of action is within the jurisdiction of a County Court, an injunction may in a proper case be granted to restrain an apprehended wrong, and a declaration of right may be made in a case whether substantive relief is sought or not in as full and ample a manner as in a case in the High Court. A threatened sale of a specific chattel which, if carried out, could have been compensated in damages, is not a proper case in which to grant an injunction restraining the sale. *Bradley* v. *Barber*, 30 Ont. R. 443.

—**Criminal appeal—Case reserved.**]—There is no appeal from criminal trials before a County Court Judge in Nova Scotia but by way of case reserved, and that judge cannot reserve a case or submit any question depending upon the facts or weight of evidence. *The Queen* v. *McIntyre*, 31 N.S.R. 422.

—**Jurisdiction—Prohibition—Unsettled account.**]—Application for prohibition to a County Court on the ground that the plaintiffs' claim was part of an unsettled account exceeding in the whole $600:—Held, that it was competent, and indeed necessary, for the judge to inquire into and decide the facts which would determine the question of jurisdiction; and as he had decided the facts in favour of jurisdiction, the Court above should not interfere by reviewing his decision, except under very exceptional circumstances:—*Joseph* v. *Henry*, 19 L.J.Q.B. 369, and *Elston* v. *Rose*, L.R. 4 Q.B. 4, followed. *Loppky* v. *Hofley*, 12 Man. R. 335.

—**County Courts Act, R.S. Man., c. 33, ss. 308, 310—Reducing amount of verdict—Appeal.**]—A County Court Judge has jurisdiction under s. 308 of the R.S.M., c. 33, to reduce the amount of a verdict.—The respondent in a County Court appeal cannot, without entering a cross-appeal, have any relief against the verdict appealed from. *Glines* v. *Cross*, 12 Man. R. 442.

—**Appeal from County Court—Review of evidence on appeal on summons to vary judgment—Agent's commission on sale of land.**]—The plaintiff recovered judgment in the County Court for commission on the sale of a parcel of land for defendant at the full amount of percentage usually allowed. Defendant applied under s. 309 of The County Courts Act, R.S.M., c. 33, for a new trial, or to reverse or vary the judgment, relying on the fact that another real estate agent had recovered a verdict against him for one-half the usual commission in respect of the same sale, and appealed to the Full Court from the County Court Judge's order dismissing that application:—Held, that on such an appeal the Court cannot review the original decision on the facts in the same manner as it would do on an appeal direct from the original verdict, and can only consider whether the decision of the County Court Judge on the application that was made was erroneous or not. On such an application, it is not the duty of the judge to try the case anew, and he should not disturb the verdict he has rendered unless on reconsideration it appears to him that there has not been evidence on which a jury could have found as he did, or that his verdict has been arrived at through an oversight or misconception of the law or the evidence. On considering the evidence, and applying these principles, the appeal should be dismissed. The fact of the recovery by another plaintiff of commission in respect of the same sale was *res inter alios acta*, and was not in itself material: *Smith* v. *Smyth*, 9 Man. R. 569, followed. *Douglas* v. *Cross*, 12 Man. R. 533.

—**Appeal—County Court Judge (Ont.)—Order of—Persona designata.**]—

See BANKRUPTCY AND INSOLVENCY II.

—**Power of County Court Judge to try criminals summarily.**]—See CRIMINAL LAW, XVI.

COUNTY CROWN ATTORNEY.

—**Post mortem—Withdrawal—Consent of County Crown Attorney.**]—See CORONER.

COURT OF REVIEW.

—**Inscription—Amount of deposit—Amount in controversy—Art. 1196 C.C.P.**]—See APPEAL, X.

COVENANT.

—**Separation deed—Husband and wife—Covenant as to release of dower.**]

See HUSBAND AND WIFE, XIV.
" CONTRACT.
" MORTGAGE.

CRIMINAL LAW.

I. Accessories.

—Larceny—Aiding and abetting—Crim. Code, s. 61 (c).]—Although the crime of theft is usually complete when the thief takes and carries away the thing which he had formed the design to steal, the act of carrying the object away may be continued until it is concealed somewhere so as not to be found upon him; and any one who knowingly assists a thief to conceal stolen property which he is in the act of carrying away, renders aid to the actual perpetrator, and becomes an accessory to the crime; and, under the provisions of Art. 61 (*c*) of the Criminal Code, may be dealt with as a principal. A person may be lawfully convicted of aiding and abetting on evidence that he received stolen money from the thief immediately after the commission of the crime, for the purpose of finding a safe place of deposit for it, and subsequently returned it to the thief. On an indictment charging the prisoner, by a first count, with theft, and, by a second count, with having received the thing knowing it to have been stolen, a general verdict of "guilty" may properly be recorded under the direction of the Court, where the jury were of opinion that the prisoner merely aided and abetted the principal party. *The Queen* v. *Campbell*, 8 Que. Q.B. 322, 2 Can. Cr. Cas. 357.

—Art. 61 Criminal Code—Trial—Evidence.]—An aider and abettor may be tried and convicted as a principal (Art. 61 Criminal Code).—The evidence in such case must shew a common criminal intent with the principal, and an actual or constructive participation in the commission of the offence. *The Queen* v. *Graham*, 8 Que. Q.B. 169, 2 Can. Cr. Cas. 388.

II. Bail.

—Recognisance—Condition to appear for sentence—Estreat.]—The accused was convicted by a jury of a criminal offence, but the judge reserved a case as to the admissibility of certain evidence, and admitted the prisoner to bail. The condition of the recognisance entered into was that the prisoner would appear at the next sitting of the Court to receive sentence. Afterwards the Full Court quashed the conviction and ordered a new trial. The accused not having appeared at the next sitting, proceedings were taken to estreat the recognisance and for the collection of the named penalties.—Held, that the condition of the recognisance was not broken, and that the purpose of the accused's attendance having failed, the sureties were not bound for his appearance. Roll of estreated recognisance and *fi. fa.* issued thereon set aside: *The Queen* v. *Wheeler*, 1 C.L.J.N.S. 272, and *The Queen* v. *Ritchie*, 1 C.L.J.N.S. 272, followed. *The Queen* v. *Hamilton*, 12 Man. R. 507, 3 Can. Cr. Cas. 1.

—Committal by Bench warrant—Bail—Whether committing judge functus officio.]—A judge who has committed a prisoner for trial for perjury under R.S.C., c. 154, s. 4 (*d*), is not thereby *functus officio*, but may subsequently admit the prisoner to bail. *Re Ruthven*, 6 B.C.R. 115, 2 Can. Cr. Cas. 39.

III. Completion of Offence.

—Jurisdiction—Offence commenced in one province and completed in another—False statement in letter.]—Held (concurring in the opinion of Wurtele, J., in *The Queen* v. *Gillespie*, 1 Can. Cr. Cas. 551), that where the offence charged was the making, circulation, and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived in Montreal, the offence, although commenced in Ontario, was completed in Montreal by the delivery of the letters to the parties to whom they were addressed. In such case the Court of Queen's Bench in Montreal has jurisdiction to try the accused who has been duly committed for trial by a magistrate of the district. *The Queen* v. *Gillespie* (No. 2), 2 Can. Cr. Cas. 309, 8 Que. Q.B. 8.

IV. Criminal Fraud.

—Criminal Code, s. 369, s.s. (b)—Conviction—Absence of proof of original fraud—Failure of trial judge to instruct jury—Security—Fraud—Reception of property by third party, with notice of agreement—Effect of.]—C. & D. purchased from L. & Sons an engine and boiler for the sum of $1,840. Of this amount they paid $1,000 in cash, and gave notes for the balance, payable in 6 and 12 months. Before the delivery of the boiler and engine, C. & D. agreed with L. & Sons to give the latter a first bill of sale as security for the payment of the notes. C. & D. failed to give the security agreed, and, being pressed by creditors, made an assignment of their property, including the engine and boiler, to S., one of the defendants, as trustee for the benefit of creditors. Defendants were convicted under the Crim. Code, s. 369, s.s. (b) for having received the property in question with intent that C. & D. should defraud their creditors.—Held, that the reception of the property by the defendant, S., was not an

offence under the section of the Code in question in the absence of proof of the original fraud.—Held, also, that what was contemplated by the section was such an abstraction, or doing away with property, as would, if carried out, completely rob the creditors, or any of them, of any benefit whatever. *The Queen* v. *Shaw*, 31 N.S.R 534.

V. Depositions.

—Evidence at coroner's inquest—Art. 687 Crim. Code—Abstract.]—An abstract made by a coroner of the evidence given by a witness at an inquest—the abstract being in a language not spoken by the witness—is not a deposition within the meaning of Art. 687 of the Criminal Code of Canada, such abstract not being a *verbatim* record of the witness's evidence, and moreover not having been read to or signed by him. *The Queen* v. *Graham*, 2 Can. Cr. Cas. 388, 8 Que. Q.B. 167.

VI. Embezzlement.

—20 & 21 V., c. 54, s. 12 (Imp.)—Application—Criminal prosecution.]—*Quære:* Is the Imperial Act 20 and 21 V., c. 54, s. 12, in force in British Columbia? If in force it would not apply to a prosecution for an offence under R.S.C., c. 164 (The Larceny Act, s. 58). *Major* v. *McCraney*, 29 S.C.R. 192, 2 Can. Cr. Cas. 547.

VII. Evidence.

(*a*) *Admissibility.*

—Receiver of stolen goods—Witness on another indictment—Incrimination.]—A witness who is not a party to the indictment for theft submitted to the jury, cannot be excused from answering questions on the ground that he himself is indicted with another as receiver of the goods stolen, and that his answers might incriminate him; but his objection shall be noted and his evidence shall not be used against him at his trial. *The Queen* v. *McLinchy*, 2 Can. Cr. Cas. 416, 8 Que. Q.B. 166.

—Confession—Inducement by prosecutor.]—Evidence is inadmissible of a confession by the accused that he had stolen money from his employer, when such confession was induced by a statement of the employer that it would be better for the accused to confess, and that if he did not do so, he, the employer, would send for an officer. *The Queen* v. *Jackson*, 2 Can. Cr. Cas. 149.

—Confession—Threat or inducement preceding confession—Stealing post-letter—Cr. Code 326(6). A confession by an accused person charged with stealing post-letters, induced by a false statement made to him by a detective employed by the prosecution, in presence of a post office Inspector, that the accused had been seen taking the letters, will render the confession inadmissible in evidence against the accused. *The Queen* v. *MacDonald*, 2 Can. Cr. Cas. 221.

—Depositions on preliminary inquiry, of witness since deceased—Meaning of 'purports to be signed by the justice'—'Substantial wrong' at trial—Cr. Code 590, 687, 746 (*f*).]—In order that s. 687 of the Criminal Code should apply to make admissible as evidence at the trial the deposition of a witness, since deceased, taken on a preliminary inquiry or other investigation of a charge against the accused before a justice of the peace, the document containing the deposition is alone to be looked at to ascertain if the deposition "purports to be signed by the justice," as is required by that section. Where the deposition sought to be used had been signed by both the witness and the magistrate, and was attached at the end of depositions taken by the magistrate on a previous date named, but did not itself contain a new "caption," or the date when taken, or any record by the magistrate certifying that such added deposition had been *taken by* him, and the first depositions formed in themselves a complete document concluding with the magistrate's note of the remand of the case, it is not to be presumed that the informal deposition following the formal document is a continuation of the first deposition (in which appeared no reference to the added deposition), or that it relates to the same charge; and it was held that such added deposition did not "purport to be signed by the justice by or before whom the same purports to have been taken." A deposition, the caption of which sets out the name of the justice and describes him as one of the justices of the peace for a named county, "purports to be signed by the justice by or before whom the same purports to have been taken," if the same is signed by the justice with his name only, without adding to it, as in form 8 of the Code, the initials "J.P." and the name of the county for which he is a justice; and such a deposition is prima facie admissable in evidence. Where a deposition of a deceased witness taken on an inquiry before a magistrate has been improperly admitted in evidence at the trial, and is of such a nature that it must have influenced the jury in their verdict, its improper admission is a "substantial wrong" entitling the accused to a new trial. *Per Killam, J.*—The deposition of a deceased witness may be used in evidence apart from s. 687, Cr. Code, although it does not "purport to be signed by the justices by or before whom the same purports to have been taken," but, where it is not admissable by virtue of s. 687, it must be affirmatively shewn that all the formalities required to be observed in taking depositions (Cr. Code 590) have been complied with. *The Queen* v. *Hamilton*, 2 Can. Cr. Cas. 390.

—Confession—Hope of clemency—Evidence admitted and afterwards struck out—New jury—New trial—Cr. Code, 746.]—Where an alleged confession is received in evidence after objection by the accused, and the trial judge before the conclusion of the trial reverses his ruling and strikes out the evidence of the alleged con-

fession, at the same time directing the jury to disregard it, the jury should be discharged and a new jury impaneled. If the trial judge refuses to impanel a new jury in such a case, a new trial will be ordered by a Court of Appeal. On the motion before the Court of Appeal for a new trial the court will not determine the question of the admissibility of the alleged confession. *The Queen* v. *Sonyer*, 2 Can. Cr. Cas. 501.

(*c*) *Corroboration.*

—Seduction—Girl between 14 and 16—Evidence—Corroboration—Cr. Code 181, 684 (c.).]—Evidence of the girl's pregnancy, and of her having been employed in domestic service at the defendant's residence and of facts shewing merely a strong probability of there having been no opportunity at which any other man could have been responsible for her condition, does not constitute corroborative evidence "implicating the accused" required by Cr. Code, s. 684, in order to sustain a conviction. *The Queen* v. *Vahey*, 2 Can. Cr. Cas. 258.

(*d*) *Sufficiency.*

—Deposition—Proof of absence of witness.]—The evidence of a constable, to the effect that he had been informed that a certain witness examined at a coroner's inquest had left the country (without producing the person who gave him the information), is not sufficient to prove the absence of the witness. *The Queen* v. *Graham*, 8 Que. Q.B. 167, 2 Can. Cr. Cas. 388.

—Obtaining goods by false pretences—Conviction—Insufficient evidence—Word "owner" used in connection—"Registered owner."]—On the 17th June, 1895, H. wrote C. in reference to a coal charter for the schooner "Chlorus," signing himself J. B. H., "owner." On the 9th October of the same year, after intervening voyages, H. obtained goods and supplies for the vessel from C., and the latter paid cash to third parties, who supplied apples as cargo, on receipts signed by H. as owner. At the time the letter of June 17th was written; and at the time the goods in question were supplied, the vessel was registered under the Merchant's Shipping Act in the name of the wife of H., having been transferred to her by a third party to whom the vessel was transferred by H.:—Held (Ritchie and Meagher, JJ., dissenting) that the evidence was not sufficient to convict H. of directly obtaining the goods or money by means of the false pretence. Held, that the word "owner," as used, did not necessarily mean "registered owner." *The Queen* v. *Harty*, 2 Can. Cr. Cas. 103, 31 N.S.R. 272.

—Code, s. 210, s.s. 2—Failure to provide necessaries for wife—Words "likely to be permanently injured"—Questions of fact for judge.]—Defendant was tried and convicted by the judge of the County Court for District No. 1, on a charge preferred under the Code, s. 210, s.s. 2, for having omitted, without lawful excuse, to provide necessaries for his wife, in consequence of which her health was likely to be permanently injured. The evidence shewed that defendant, who was in regular receipt of wages amounting to six dollars per week, refused to make any provision for his wife, at a time she was pregnant and incapacitated for work:—Held, that there was evidence upon which the judge could properly find against the accused. Held, also, that the words "likely to be permanently injured" have no technical meaning, and that, in every case, it is purely a question of fact whether the acts proved are of such a character that the health of the wife is likely, by reason of those acts, to be permanently injured. Held, also, as to the excuse set up, that it was a question of fact as to which the judge had to decide as to its sufficiency. *The Queen* v. *Bowman*, 31 N.S.R. 403.

—Cr. Code, s. 210, s.s. 2—Failure to provide necessaries for wife—Case reserved.]—The prisoner was tried and convicted under the Code, s. 210, s.s. 2, on a charge of neglecting to provide necessaries for his wife, whereby her health was likely to be permanently injured:—Held, affirming the conviction, that slight evidence was sufficient, the words "likely to be permanently injured" being so indefinite as to leave the question entirely in the discretion of the trial judge. Held, that there is no appeal from criminal trials before the County Court judge but by way of case reserved, and that judge cannot reserve a case or submit any question depending upon the facts or weight of evidence. *The Queen* v. *McIntyre*, 31 N.S.R. 422.

VIII. Extradition.

—Forgery — Initiating prosecution.]—The prisoner, using an assumed name, represented himself to a shopkeeper to be a traveller for a certain wholesale firm, and after going through the form of taking an order for goods, obtained the endorsement of the shopkeeper to a draft drawn by him in his assumed name on this firm, and this draft was then cashed by him at a bank:—Held, that this was forgery and that the prisoner should be extradited. A prosecution under the Extradition Act may be initiated by any one who, if the offence had been committed in Canada, could put the criminal law in motion. *In re Burley* 1 C.L.J. 34; *Regina* v. *Morton*, 19 U.C.C.P. 9. Judgment of Meredith, C.J., 30 O.R. 419, affirmed. *Re Lazier*, 26 Ont. App. 260, affirming 30 Ont. R. 419.

—Jurisdiction — Warrant — Fugitive criminal—R.S.C., c. 142.]—Judges and commissioners in extradition matters can only act judicially within the province for which they have been appointed.—A warrant issued by an extradition commissioner under the Extradition Act of Canada, R.S.C. c. 142, for the apprehension of a fugitive criminal, where the complaint on which the warrant was issued states and shews that at the time the complaint was

laid he was in another province of the Dominion, is therefore null and of no effect. *Ex parte Jean Seitz*, 8 Que. Q.B. 345, 3 Can. Cr. Cas. 54.

—Evidence—Admissions.]—Where an application for extradition is founded upon deposition evidence, it will be required to strictly conform to the conditions prescribed by the Act for such evidence, and nothing will be inferred in its favour. The warrant of the Magistrate in the foreign jurisdiction was dated before the date of the swearing of the deposition. The evidence consisted in part of admissions stated to have been made by the accused, but there was nothing to shew that the admission was not procured by any inducement to the prisoner to make a statement. Held:—The evidence was insufficient upon which to extradite the accused. *Re Ockerman*, 2 Can. Cr. Cas. 262, 6 B.C.R. 143.

IX. False Pretences.

—False pretences—Debtor receiving rent after judicial abandonment—Insolvency—Cr. Code 358, 359, 743.]—(1) A charge of obtaining money under false pretences may be supported by shewing a false pretence by the conduct and acts of the accused, and such pretence need not be in words or writing. (2) A debtor who has made a judicial abandonment for the benefit of his creditors whereby his property becomes vested in another, and who, knowing that he no longer had any right to receive the rent, presents himself afterwards as landlord to a tenant of the property, and receives the rent as he had formerly been accustomed to do, is guilty of a false pretence by his acts and conduct. (3) A reserved case should not be granted by the trial judge unless he has some doubt in the matter upon which it is suggested that a question be reserved for the opinion of a Court of Appeal. (4) Per Court of Appeal: The question whether the facts disclosed in a case constitute the crime of obtaining money by conduct amounting to false pretences, is not a question of law but an issue of fact within the province of a jury and cannot be made the subject of a reserved case. *The Queen* v. *Létong*, 2 Can. Cr. Cas. 505.

X. Forcible Entry.

—Forcible entry—Trespass on lands—Criminal Code, s. 89.]—See Trespass to Land.

XI. Grand Jury.

—Grand jury—Number summoned.]—The sheriff had, by mistake, summoned twenty-four grand jurors instead of twelve. Only the first twelve were called, and one of them being ill but eleven were sworn, and they returned a true bill for murder against the prisoner:—Held, that this return was valid, the law now only requiring for this purpose the concurrence of seven grand jurors in all the provinces in which the number does not exceed thirteen. Crim. Code, s. 629; 57 & 58 V., c. 57 (D); 57 & 58 V., c. 57 (P.Q.). *The Queen* v. *Poirier*, 7 Que. Q.B. 483.

—Criminal procedure—Number of grand jurors competent to find a true bill—Since the coming into force of 57 & 58 V. (Can.), c. 57, s. 1, enacting that seven grand jurors, instead of twelve as formerly, may find a true bill in any province where the panel of grand jurors is not more than thirteen, in the Province of Quebec, where the number of grand jurors to be summoned has been reduced to twelve, if any of them fail to appear, those present may be sworn to act as a grand jury, and find a "true bill," provided that seven of them agree to the finding. *The Queen* v. *Girard*, 7 Q.B. 575, 2 Can. Cr. Cas. 216.

XII. Mixed Jury.

—Language of the defence—27 & 28 V., (Can.), c. 41, s. 7.]—The words "language of the defence" in s.s. 2 of s. 7 of the statute of the Province of Canada, 27 & 28 V., c. 41, which is still in force in the Province of Quebec, mean the language of the prisoner, and not the language in which his defence is to be conducted. The privilege of the prisoner is to claim a jury composed for one half at least of jurors speaking or skilled in his language. *The Queen* v. *Vancey*, 8 Que. Q.B. 252, 2 Can. Cr. Cas. 320.

XIII. Jurisdiction.

—Offence commenced in one province and completed in another—Letter mailed to another person intended to be deceived by false statement.]—Where the offence charged was the making, circulation and publication of false statements of the financial position of a company, and it appeared that the statements were mailed from a place in Ontario to the parties intended to be deceived in Montreal, the offence, although commenced in Ontario, was completed in Montreal by the delivery of the letters to the parties to whom they were addressed. In such case, the Court of Queen's Bench in Montreal has jurisdiction to try the accused, if he has been duly committed for trial by a magistrate of the district. *Ex parte Gillespie*, 7 Que. Q.B. 422 concurred in. *The Queen* v. *Gillespie*, (No. 2), 2 Can. Cr. Cas. 309, 8 Que. Q.B. 8.

XIV. Neglect to Bury Dead Body.

—Neglect of duty to bury—Duty undertaken by person not under legal obligation—Cr. Code 206.—The neglect to decently bury a dead human body by a person who has undertaken to do so and has removed the body with that expressed intent is an indictable offence under Cr. Code, s. 206, although such person was, apart from such undertaking, under no legal obligation in respect of the burial. *The Queen* v. *Newcomb*, 2 Can. Cr. Cas. 255.

XV. New Trial.

—Challenge for cause—Improper acts of juror—Verdict against evidence.]—If a defendant omit to challenge a juror on the ground that such juror entertains a hostile feeling against him, he cannot after a verdict of guilty ask

on that ground to get the verdict quashed and to have a new trial. When a private prosecutor and one of the impanelled jurors have had an unpremeditated and innocent conversation, which could not bias the juror's opinion, nor affect his mind and judgment, although such conversation is improper it cannot have the effect of avoiding the verdict and constituting ground for allowing a new trial. It is the province of the jury, after taking into consideration the circumstances of a case and the character and demeanour of witnesses, to discredit some of the witnesses and reject their evidence, and to believe others and accept their evidence; and when there is a conflict in the evidence but there is evidence to support the verdict it cannot be judicially maintained that the verdict is against the weight of evidence. When, however, there is no conflict in the evidence and it tends indubitably in a direction favourable to the defendant, or does not establish his guilt, a verdict convicting the defendant would not be supported by nor be based upon proper evidence, and would manifestly be against the weight of evidence; and it is only in cases where there is an absolute failure of evidence to sustain the verdict, that the Court can give leave to apply to the Court of Appeal for a new trial. *The Queen* v. *Harris*, 2 Can. Cr. Cas. 75, 7 Que. Q.B. 569.

XVI. Practice and Procedure.

—Committal for one offence—Change of venue—Trial for two offences—Oath—Comment by Judge on Prisoner not testifying—Recalling Jury—Withdrawal of comment—New Trial.]—The prisoner was committed for trial in one county upon a charge of perjury alleging an offence committed in that county. The venue was changed to another county, where he was tried and found guilty upon an indictment containing two counts, alleging two offences arising out of the same matter. The facts relating to both of the charges appeared in the depositions taken by the committing magistrate:—Held, that there was jurisdiction to try for both offences in the county to which the venue had been changed. On the occasion when the perjury was alleged to have been committed the oath was administered to the prisoner in open court by the clerk of the county court, sitting in the general sessions of the peace for and at the verbal request of the clerk of the peace. Held, that the witness was properly sworn. At the trial the prisoner did not testify on his own behalf and the trial judge in his charge to the jury, contrary to the provisions of the Canada Evidence Act, 1893, s. 4, s.s. 2, commented upon that fact, although, when his attention was drawn to it, he recalled the jury and withdrew his comment. Held, that the prisoner had a right to have his case submitted to the jury without the comment and, having been deprived of that right, there was a substantial wrong done to him which could not be undone by calling back the jury and withdrawing the comment. New trial ordered. *The Queen* v. *Coleman*, 2 Can. Cr. Cas. 523, 30 Ont. R. 93.

—Venue—Change of—Criminal cause—Fair trial—Riot at former trial—Affidavits of jurors.]—Under s. 651 of the Criminal Code the venue for the trial of a person charged with an indictable offence may be changed to some place other than the county in which the offence is supposed to have been committed, if it appears to the satisfaction of the Court or Judge that it is expedient to the ends of justice, by reason of *anything* which may interfere with a fair trial in that county; it is not a question as to the jury altogether. And where at a trial of the defendant, at which the jury disagreed, a crowd of persons congregated round the court house while the jury were deliberating, and endeavored to intimidate the jurors and influence them in favour of the defendant, and afterwards made riotous demonstrations towards the Judge who presided at the trial, the venue was changed before the second trial. Where affidavits were filed by the Crown to shew that the conduct of the crowd must have influenced the jurors, affidavits of jurors denying that they were intimidated were received in answer. *The Queen* v. *Ponton* (No. 2), 2 Can. Cr. Cas. 417, 18 Ont. Pr. 429.

—Crown case reserved—Code, s. 596, 765—Power of County Court Judge to try summarily.]—Defendant after preliminary enquiry, before the stipendiary magistrate for the City of Halifax, was put upon her trial, but was admitted to bail, conditioned to appear at the next Court of Oyer and Terminer and General Jail Delivery, and surrender herself to the keeper of the jail and plead to such indictment as might be preferred against her by the grand jury. Before the meeting of the Supreme Criminal Court, defendant was surrendered by her surety, and, while in jail, was brought before the judge of the county court for District No. 1, and, having elected to be tried by him, was tried and convicted:—Held, following *The Queen* v. *Gibson*, 29 N.S.R., 4, that the judge of the county court had no jurisdiction to try the defendant, and the conviction must, therefore, be set aside. Held, that the "comittal to jail for trial," referred to in the Code, and which confers jurisdiction upon the judge of the county court to try, is a committal by the magistrate, and not a committal by order of the judge of the county court, when the party is surrendered by his bail, the latter not being a committal for trial, but a committal for want of sureties to appear and take his trial. *The Queen* v. *Smith*, 31 N.S.R. 411.

—Cruelty to animals—Summary proceedings—Appeal—Notice—Crim. Code, s. 880 (b).]—If proceedings are taken before Justices of the Peace by an agent of a Society for Prevention of Cruelty to Animals, an appeal from the decision of the justices should be

taken by the agent himself and not by the society.—In the notice of appeal under s. 880 (*b*) Crim. Code, given to the justices for the respondent, and following the form NNN. in the Schedule, the omission of the words, "for the respondent," is fatal, and the appeal will be dismissed therefor, even if it be established that the respondent had left the country and could not be served. *Canadian Society for the Prevention of Cruelty to Animals* v. *Lauzon*, 5 Rev. de Jur. 259.

—Crown case reserved—Grand Jury panels—Criminal courts and procedure — Powers of Dominion and provincial legislatures.]—By c. 38 of the Acts of the Province of Nova Scotia for the year 1898, passed the 11th day of March, 1898, the number of grand jurors to be summoned at any term of the Supreme Court, in any county of the province, was reduced to 12 instead of 24, as formerly, and 7 grand jurors were empowered to find a true bill in any matter, instead of 12, as formerly. By a special Act, passed on the same day, Acts of 1898, c. 101, the list of grand jurors for the County of Hants having been destroyed by fire, the clerk of the county court at Windsor was authorized to draw the names of 12 grand jurors to serve as such at the next term of the Supreme Court at Windsor. Upon the grand jury, summoned under the provisions of the last-mentioned Act, being called on the opening of the sittings, ten only appeared in answer to their names. These were sworn in regular form, and, having considered the case preferred against the prisoner, returned an indictment upon which he was tried and convicted. Upon a Crown case reserved, as to the competency of the legislature of the province to pass the Acts referred to—Held, (1), (Townshend, J., reserving any opinion on the first point), that it was within the power of the local legislature to fix the number of the grand jurors who should compose the panel, that being part of the organization or constitution of the court; (2), but that the legislature had no power to fix the number of grand jurors necessary to find a good bill of indictment, that being a matter of criminal procedure and exclusively within the powers of the Dominion legislature. *The Queen* v. *Cox*, 2 Can. Cr. Cas. 207, 31 N.S.R. 311.

—Crown case reserved—Jurisdiction of Stipendiary Magistrate—Waiver of objection to jurisdiction of county court judge.]—Defendant was brought before the Stipendiary Magistrate for the City of Halifax charged with being the receiver of a sum of stolen money, the offence having been committed on McNab's Island, in Halifax harbour. The defendant was committed to the Supreme Court for trial, but elected to be tried summarily before the judge of the County Court, District No. 1, and was tried and convicted. On a case reserved as to whether or not the Stipendiary Magistrate had power to commit for such an offence, and as to whether the fact of the prisoner being in jail and being brought before the judge of the county court, and electing to be tried by him, gave the judge jurisdiction to try the case.—Held, that the Stipendiary Magistrate had power to hold the enquiry and make the committal. Per Townshend, J. (Henry, J., dissenting) —Held, that the prisoner having appeared and consented to be tried by the county court judge, his objection to the jurisdiction came too late. *The Queen* v. *Brown*, 31 N.S.R. 401.

—Criminal Court—Order granted by judge sitting at—Power of Court, in banc, to review or discharge—Case for order, nunc pro tunc.]—At the autumn sittings of the Criminal Court at H., a bill was preferred against defendant for assault. The bill was ignored by the grand jury, and defendant, thereupon, made application for an order to compel the payment of certain costs by the prosecutrix. Judgment was reserved, and on the 8th October the Court adjourned *sine die*. On the 10th October the learned judge filed, with the officer of the Court, a memorandum allowing costs against the prosecutrix, and an order was thereupon drawn up, bearing date October 8th, ordering the payment of costs by the prosecutrix, the amount to be determined by the judge by whom the order was granted, on application, and that defendant have execution for the costs when so determined. On application to review or discharge the order so made:—Held, per Meagher, J. (Ritchie, J., concurring), that the power to hear cases reserved from the Criminal Court, or appeals or other applications in relation to matters pending or determined therein, is not an original or inherent jurisdiction, but is statutory, and that there was no appeal to the Court *in banc* from such an order as that in question, nor had the Court power to renew or discharge it. Held, also, assuming that the criminal term ended on the 8th October, and that the order was not made until the 10th, and that the Court had jurisdiction, it being obvious that the delay from the 8th to the 10th was due to the act of the Court, and not to any neglect on the part of defendant, that the case was a proper one for an order *nunc pro tunc*, and that the order might be regarded as if made on the day on which it bore date. Per Graham, E. J. (Henry, J., concurring):—Held, that the order was a nullity, there being no judgment of that date; and being an order upon which execution might issue, resulting in an abuse of the process of the Court, that it should be set aside. Held, also, that there is no statute enabling judgments to be filed in criminal cases, or providing for the initialing of orders. Held, also, that the order could not be taken, even in a civil case, *nunc pro tunc*, without leave of the Court, and that there were no special circumstances to authorize the issue of such an order in this case. Held, also, that the application to set aside the order was properly made to this Court *in banc*. *In re*

Sproule, 12 S.C.R. 146, discussed. *The Queen* v. *Mosher*, 32 N.S.R. 139.

—Unnecessary recitals in conviction—Adjournments of hearing before justice of the peace in absence of accused—Criminal Code, ss. 853, 857, s.s. 1—Objections not raised at trial.]—A conviction in the form prescribed by the Criminal Code will not be held bad because it also contains recitals shewing certain adjournments of the hearing before the justice but not shewing that no adjournment had been made for a longer period than the eight days allowed by s. 857, s.s. 1, of the Criminal Code, although more than three months had elapsed from the commencement to the end of the proceedings. It is not necessarily to be inferred from the statement of certain facts, which were not required to be stated, that other circumstances necessary to the jurisdiction of the Magistrate did not exist. The hearing before a justice trying a person for an offence punishable on summary conviction may be adjourned from time to time under s. 853 of the Code, although the accused be not present, provided the adjournments are made in the presence and hearing of the solicitors or agents of the parties. *Proctor* v. *Parker*, 12 Man. R. 528.

—Right of Crown to an adjournment after election to proceed without a material witness.]—Although the Crown elects to proceed with a speedy trial in the absence of a material witness, and although the trial has commenced, the Court has power to grant an adjournment to enable the Crown to get the witness. *The Queen* v. *Gordon*, 2 Can. Cr. Cas. 141, 6 B.C.R. 160.

—Warrant of commitment—Invalidity—Magistrate's official designation—Description—Verbal threats to burn buildings—Habeas corpus—Cr. Code 233, 485, 486, 487, 959 (2).]—A justice's warrant of commitment for trial must describe an offence for which a commitment for trial can be legally made. Threats verbally made to burn the complainant's buildings are not indictable under the Criminal Code, and give rise only to proceedings to force the offender to give security to keep the peace. A warrant of commitment signed by magistrates as "Justices of the Peace in and for the County of Labelle," no justices being appointed with such designation and no such title existing at law, is illegal, and, when no application is made for its amendment, should be quashed, and the prisoner discharged upon habeas corpus. Justices presuming to act as such in and for a county named will not be presumed to have acted as justices for the district in which the county is situate, and for which district they have been appointed. *Ex parte Welsh*, 2 Can. Cr. Cas. 35.

—Security to keep the peace—Commitment in default — Negativing malice in complaint — Recital in warrant of commitment.]—A warrant of commitment by a justice under Cr. Code 959 (4), for default in finding sureties to keep the peace must shew on its face that the complainant feared bodily injury because of the defendant's threat, and that the complaint was not made nor sureties required by the complainant from any malice or ill-will, but merely for the preservation of his person from injury. (Code Form WWW.) *The Queen* v. *John McDonald*, 2 Can. Cr. Cas. 64.

—Certiorari—Recognizance—Sufficiency of justification by sureties—Appeal taking away right to certiorari—Cr. Code 801, 892.]—An affidavit of justification upon a recognizance given pursuant to Rule of Court passed under s. 892 of the Criminal Code, need not state that the surety is worth the amount of the penalty over and above other sums for which he is surety. The rule made under s. 892 of the Criminal Code requiring sufficient sureties for a specific amount is complied with if the sureties justify as being possessed of property of that value and swear that they are worth the amount over and above all their just debts and liabilities, and over and above all exemptions allowed by law. (*R.* v. *Robinet*, 2 Can. Cr. Cas. 382 not followed.) The mere filing of a recognizance by the defendant for an appeal from a summary conviction does not deprive him of his right to a writ of certiorari for the purpose of having the conviction quashed for want of jurisdiction. If a conviction has been filed by the Magistrate under s. 801 of the Criminal Code, in a Court of superior criminal jurisdiction, a motion may be made to quash the same without the necessity of a writ of certiorari. Section 892 of the Criminal Code authorizes the requiring of a recognizance only where the conviction is brought before the Court by a writ of certiorari, and no recognizance is required where such a writ is not necessary or is dispensed with. *The Queen* v. *Ashcroft*, 2 Can. Cr. Cas. 385.

—Habeas Corpus — Commitment — Identity of accused—Objection to wrong name—Time for stating—Amendment before plea—Alias name.]—A person who is charged under a wrong name, and who pleads without objection to same, is not entitled after conviction to be released under a writ of habeas corpus on the ground that she is not the person against whom the commitment was issued. The proper time to take objection to a wrong name under which an accused is charged is before pleading to the charge, at which time the mistake may be corrected by an amendment. *Ex parte Corrigan*, 2 Can. Cr. Cas. 591.

—New trial—Appeal from refusal—Crim. Code ss. 742-750—"Opinion."]

See APPEAL, XI. (*b*)

—Canada Temperance Act — Conviction — Imprisonment—Fine—Distress.]

See CANADA TEMPERANCE ACT, II.

—Conviction by magistrate—Subsequent indictment—Plea of autrefois convict.]

See JUSTICE OF THE PEACE, VI.

—Wounding with intent—Preliminary inquiry —Reducing charge to assault — Conviction by justices—Bar to civil action—Cr. Code 262, 864, 866.]—See JUSTICE OF THE PEACE, VI.

—Illicit distilling—Warrant of commitment—Costs—Habeas Corpus.]—See REVENUE.

XVII. PUNISHMENT.

—Statute imposing fine and imprisonment—Discretion of court.]—Where a Statute prescribes as the punishment for an offence both fine and imprisonment, the punishment is in the discretion of the Court, which is not bound to inflict both, but may inflict either one or the other of the two kinds of punishment. *The Queen* v. *Robidoux*, 2 Can. Cr. Cas. 19; *sub. nom. Brabant* v. *Robidoux*, 7 Que. Q.B. 527.

XVIII. RAPE.

—Female under age of 14—Arts. 266 and 267, Cr. Code.]—The words "man" and "woman" in article 266 of the Criminal Code, which defines the crime of rape, are to be taken in a general or generic sense as indicating all males and females of the human race, and not in a restricted sense as opposed to boys and girls.—An indictment for rape under articles 266 and 267 of the Criminal Code lies against one who has ravished a female under the age of fourteen years against her will, notwithstanding the provisions of article 269, which enacts that every one is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife. *The Queen* v. *Riopel*, 2 Can. Cr. Cas. 225, 8 Que. Q.B. 181.

XIX. SPEEDY TRIALS.

—Adjournment—Election to proceed in absence of material witness—Discretion to allow change of election, although acted upon—Cr. Code 777.]—An adjournment of a speedy trial may be made under Cr. Code 777 in order to obtain the attendance of a material witness, although the party applying for same had elected to proceed without such witness, and although the trial had commenced. *The Queen* v. *Gordon*, 2 Can. Cr. Cas. 141.

XX. SUMMARY CONVICTION.

—Canada Temperance Act—Jurisdiction of Magistrate—Form of conviction.]—The District Magistrate appointed, with jurisdiction in the district of St. Francis and of Bedford, sufficiently shews his jurisdiction when he describes himself as "District Magistrate in and for the district of Bedford," when acting in the latter district.—A commitment made according to form X appended to 51 V., c. 34, based upon a conviction for a third offence under the provisions of the Canada Temperance Act, is sufficient, and is so declared by s. 14 of said Act.—It is not necessary that it should be declared in the statement of previous convictions, in such commitment, that such were first and second offences respectively, but the previous conviction first related will be deemed to be intended for a first offence.—The conviction and the commitment reciting it, must shew, or it must appear thereby, that the offence deemed to be a second offence was committed after the laying of the information for the first; and when the commitment shews that the previous conviction as first recited was for an offence posterior to the previous conviction secondly recited, the commitment does not shew a valid conviction for a third offence, and a writ of Habeas Corpus will be granted and the prisoner liberated. *Ex parte Robinson*, 5 Rev. de Jur. 271.

—Imposition of fine—Forfeiture.]—A summary conviction by a Justice of the Peace, whereby a fine is sought to be imposed, must adjudge forfeiture of the amount as well as payment thereof. The prisoner is entitled to be discharged under habeas corpus if the conviction merely adjudges that he "forthwith pay" a sum named, and in default of payment be imprisoned. *The Queen* v. *Crowell*, 2 Can. C.C. 34.

—Appeal from summary conviction to Court of Queen's Bench, Quebec—Offence under provincial statute.]—See APPEAL, XI. (*f.*)

XXI. SUSPENSION OF CIVIL REMEDY.

—Fraudulent appropriation of money—Capias.—Allegations of fraudulent appropriation of moneys which would support a criminal charge cannot be used to justify the issue of a writ of capias the creditor not being entitled to substitute the latter proceeding for the remedy by criminal process. *Nelson* v. *Lippe*, 14 Que. S.C. 437.

XXII. THEFT.

—Criminal Code, s. 61—Theft—Accessory—Receiver of stolen goods.]—Although under s. 61 of the Criminal Code, a person who has been accessory to a theft may be convicted as a principal thief, this does not prevent his conviction as a receiver of the stolen property, if he has subsequently received it from the actual thief. The true principle is that it is a receipt which is merely an act done in the commission of the theft which cannot be treated as a separate offence; and the statute which makes counselling or procuring form a a participation in the offence, when committed, does not also make a subsequent receipt form a part of a theft completed before the receipt. *The Queen* v. *Hodge*, 2 Can. Cr. Cas. 350, 12 Man. R. 319.

—Goods under seizure — Hotelkeeper — Lien — Tender—Recent possession as evidence of stealing—Cr. Code 306.]—An hotelkeeper who locks up the room of a guest containing the latter's baggage and effects, for non-payment of charges for board and lodging, and who notifies the guest thereof, and requires him

to leave the hotel on the same day or pay the bill, thereby places the guests' baggage, etc., under 'lawful seizure and detention,' in respect of the landlord's common law lien; and the taking away of such baggage by the guest without the landlord's authority is 'theft' under s. 306 of the Criminal Code. The landlord does not by afterwards granting permission to the guest to remove some specified articles, and by allowing him free access to the room for that purpose, abandon such seizure and detention as regards the other effects; and the owner who removes any baggage as to which the permission does not extend, is guilty of "stealing' the same under s. 306 of the Criminal Code. The fact that the amount in respect of which a lien is claimed is in excess of the amount legally due does not dispense with the necessity of a tender of the amount legally due nor invalidate the lien. *The Queen* v. *Hollingsworth*, 2 Can. Cr. Cas. 291.

And see JUSTICE OF THE PEACE.

CROWN.

I. EMINENT DOMAIN.
II. JUDICIAL PROCEEDINGS.
III. LIABILITY IN CONTRACT.
IV. LIABILITY IN TORT.
V. SET-OFF.

I. EMINENT DOMAIN.

— Expropriation — Compensation — Interest — When it begins to run.]—Interest may be allowed from the date of the taking of possession of any property expropriated by the Crown, even if the plan and description be not filed on that date. *Dewey* v. *The Queen*, 6 Can. Ex. C.R. 204.

—Expropriation—Tender—Sufficiency of—Costs —Mortgagees.]—Where the amount of compensation tendered by the Crown in an expropriation proceeding was found by the Court to be sufficient, and there was no dispute about the amount of interest to which the defendant was entitled, but the same was not tendered by the Crown, although allowed by the Court, costs were refused to either party. When mortgagees were made parties to an expropriation proceeding and they had appeared and were represented at the trial by counsel, although they did not dispute the amount of compensation, they were allowed their costs. *The Queen* v. *Wallace*, 6 Can. Ex. C.R. 264,

II. JUDICIAL PROCEEDINGS.

—Liability of Province of Canada existing at time of Union—Jurisdiction—Arbitration—Condition precedent to right of action—Waiver.]—By the Act 8 V. (P.C.), c. 90, Y. was authorized at his own expense to build a toll-bridge with certain appurtenances over the River Richelieu, in the Parish of St. Joseph de Chambly, P.Q., such bridge and appurtenances to be vested in the said Y., his heirs, etc., for the term of fifty years from the passing of the said Act; and it was enacted that at the end of such term the said bridge and its appurtenances should be vested in the Crown and should be free for public use, and that it should then be lawful for the said Y., his heirs, etc., to claim and obtain from the Crown the full and entire value which the same should at that time be worth exclusive of the value of the tolls, such value to be ascertained by three arbitrators, one of which to be named by the Governor of the Province for the time being, another by the said Y., his heirs, etc., and the third by the said two arbitrators. The bridge and its appurtenances were built and erected in 1845, and Y. and his heirs maintained the same and collected tolls for the use of the said bridge until the year 1895, when the said property became vested in the Crown under the provisions of the said Act: —Held, that upon the vesting of the bridge and its appurtenances in the Crown the obligation created by the said statute to compensate Y. and his heirs, etc., for the value thereof was within the meaning of the 111th section of The British North America Act, 1867, a liability of the late Province of Canada, existing at the Union, and in respect of which the Crown, as represented by the Government of Canada, is liable. That the Exchequer Court had jurisdiction under clause (*d*) of the 16th section of The Exchequer Court Act in respect of a claim based upon the said obligation, it having arisen under the said provisions of The British North America Act, 1867, which, for the purposes of construction of the said 16th section of The Exchequer Court Act, was to be considered a law of Canada. That under the wording of the said Act 8th V. (P.C.), c. 90, no lien or charge in respect of the value of the said property existed against the same in the hands of the Crown. Where both the Governments of Ontario and Quebec, on one or both of which the burden of the claim would ultimately fall, had expressed a desire that the matter should be determined by petition of right and not by arbitration, and where the suppliants, with knowledge thereof, had presented their petition of right, praying that a fiat thereon be granted, or, in the alternative, that an arbitrator be appointed by the Crown, and naming their arbitrator in case that course were adopted, and the Crown on that petition had granted a fiat that "right be done," even if the appointment of arbitrators for the purpose of ascertaining the value of the said bridge and its appurtenances, as provided in 8th V. (P.C.), c. 90, constituted a condition precedent to a right of action accruing for the recovery of the same, such a defence must, under the above circumstances, be held to have been waived by the Crown. *Yule* v. *The Queen*, 6 Can. Ex. C.R. 103.

—Title to land—Mistake—Lessor and lessee—Estoppel.]—Where a person is in possession

of land under a good title, but, through the mutual mistake of himself and another person claiming title thereto, he accepts a lease from the latter of the lands in dispute, he is not thereby estoppel from setting up his own title in an action by the lessor to obtain possession of the land. In such a case, the Crown being the lessor, is in no better position in respect of the doctrine of estoppel than a subject. *The Queen* v. *Hall*, 6 Can. Ex. C.R. 145.

—Expropriation—Filing new plan—Information—Crown's right to discontinue—Costs—Fiat.]—Where issue has been joined and the trial fixed in an expropriation proceeding, the Crown may obtain an order to discontinue upon payment of defendants' costs; but the Court will not require the Crown to give an undertaking for a fiat to issue upon any petition of right which the defendant may subsequently present. *The Queen* v. *Stewart*, 6 Can. Ex. C.R. 215.

III. Liability in Contract.

—Suretyship—Postmaster's bond—Penal clause—Lex loci contractûs—Negligence—Laches of Crown officials—Release of sureties.]—In an action by the Crown on the information of the Attorney-General for Canada upon a bond executed in the Province of Quebec in the form provided by the "Act respecting the Security to be given by the Officers of Canada" (31 V., c. 37; 35 V., c. 19), and "The Post Office Act" (38 V., c. 7):—Held, that the right of action under the bond was governed by the law of the Province of Quebec. Held, further, that such a bond was not an obligation with a penal clause within the application of Arts. 1131 and 1135 of the Civil Code of Lower Canada. Held, also, that the rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of Quebec, except where altered by statute: *Black* v. *The Queen*, 29 S.C.R. 693, affirming 6 Ex. C.R. 236.

—Postmasters' bond—Validity—Breach—Primary obligation—Release of sureties—Laches of government officials—Estoppel—Trial—Adjournment—Terms.]—In a case arising in the Province of Quebec upon a postmaster's bond it appeared that the principal and sureties each bound themselves in the penal sum of $1600, and the condition of the obligation was stated to be such that if the principal faithfully discharged the duties of his office and duly accounted for all moneys and property which came into his custody by virtue thereof, the obligation should be void. The bond also contained a provision that it should be a breach thereof if the postmaster committed any offence under the laws governing the administration of his office. It was objected by the sureties against the validity of the bond that it contained no primary obligation, the principal himself being bound in a penal sum, and that the sureties were, therefore, not bound to anthing under the law of the Province of Quebec:—Held, (1) That there was a primary obligation on the part of the principal, insomuch as he undertook to faithfully discharge the duties of his office, and to duly account for all moneys and property which might come into his custody. (2) That as the bond conformed to the provisions of an Act respecting the security to be given by officers of Canada (31 Vict., c. 27; 35 Vict., c. 19), and The Post Office Act (38 Vict., c. 7) it was valid even if it did not conform in every particular to the provisions of Art. 1131, C.C.L.C. It was also objected that the bond did not cover the defalcations of the postmaster in respect of moneys coming into his hands as agent of the savings bank branch of the Post Office Department. Held, that it was part of the duties of the postmaster to receive the savings bank deposits and that the sureties were liable to make good all the moneys so coming into his custody and not accounted for. The sureties upon a postmaster's bond are not discharged by the fact that during the time the bond was in force the postmaster was guilty of defalcations, and that such defalcations were not discovered or communicated to the sureties owing to the negligence of the Post Office authorities. Nor is the Crown estopped from recovering from the sureties in such a case by the mistaken statement of one of its officers that the postmaster's accounts were correct, and upon the strength of which the sureties allowed funds of the postmaster to be applied to other purposes than that of indemifying themselves. The Crown is not bound by the doctrine of *Phillips* v. *Foxall* (L.R. 7 Q.B. 666), inasmuch as it proceeds upon the theory that failure by the obligee to communicate his knowledge of the principal's wrong-doing amounts to fraud, and fraud cannot be imputed to the Crown. The statute 33 Hen. VIII, c. 39, s. 79, respecting suits upon bonds, is not in force in the Province of Quebec. Where defendants, expecting certain witnesses, whose evidence was material to defence, would be called by the Crown, did not subpœna such witnesses and they were not in court, an adjournment of the hearing was allowed, after plaintiff had rested, so that such witnesses might be subpœnaed by the defendants, upon terms that plaintiff have costs of the day, and that the same be paid before the case proceeded with on adjournment. *The Queen* v. *Black*, 6 Can. Ex. C.R. 236, affirmed 29 S.C.R. 693.

V. Set-off.

—Compensation—Petition of right.]—The defendant in an action by the Crown cannot plead compensation, but must resort to a petition of right. *Coté v. Drummond County Railway Co.*, 15 Que. S.C. 561.

And see Constitutional Laws.

CROWN GRANT.

—Public market—Restricted grant—Construction—Subsequent legislation.]—

See MUNICIPAL CORPORATIONS, XX.

CROWN LANDS.

—Scire facias—Annulment of letters patent—Tender—Sale or pledge—Concealment of material fact—Registration—Transfer of Crown lands.]—The locatee of certain Crown lands sold his rights therein to B., reserving the right to redeem the same within nine years, and subsequently sold the same rights to M., subject to the first deed. These deeds were both registered in their proper order in the registry office for the division and in the Crown Lands Office at Quebec. M. paid the balance of Crown dues remaining unpaid upon the land and made an application for letters patent of grant thereof, in which no mention was made of the former sale by the original locatee. In an action by *scire facias* for the annulment of the letters patent granted to M.—Held, that the failure to mention the *vente à réméré* in the application for the letter patent was a misrepresentation and concealment which entitled the Crown to have the grant declared void and the letters patent annuled as having been issued by mistake and in ignorance of a material fact, notwithstanding the registration of the first deed in the Crown Land Office. *Fonseca* v. *Attorney General for Canada*, 17 S.C.R. 612, referred to.—Held, further, that it is not necessary that such an action should be preceded or accompanied by tender or deposit of the dues paid to the Crown in order to obtain the issue of the letters patent. *The Queen* v. *Montminy*, 29 S.C.R. 484.

—Injunction—Presumed justice of the Crown—Crown lands—Trespass—Reservation from settlement.]—A person in possession of waste lands of the Crown, with the consent of the Crown, can mainfain trespass against persons having no title. The Court should not, upon the ground that his claim appears to be invalid, restrain a party from applying to the proper department of the Government for a Crown grant of lands, for the Court cannot presume that the Crown will not do right. Where Crown land is reserved from settlement by the Lieutenant-Governor-in-Council under s. 86 of the Land Act, it does not again become open for settlement until cancellation of the reservation by the same authority, under s. 87. *Nelson and Fort Sheppard Ry. Co.* v. *Parker*, 6 B.C.R. 1.

—Crown grant of mineral claim.]

See MINES AND MINERALS, XII.

CURATOR.

—Curator to interdict for drunkenness—Authorization of wife.]—A person interdicted for drunkenness must be represented in legal proceedings by his curator. *Greene* v. *Mappin*, M.L.R. 5 Q.B. 108, followed, and *Shepperd* v. *Hoffman*, Q.R. 12 S.C. 228, overruled.—Where the wife has been appointed curatrix to her husband interdicted for drunkenness, she is sufficiently authorized by her appointment for acts of simple administration, such as actions for the recovery of debts due to the interdict. Art. 3360 C.C. *Hoffman* v. *Lawrence*, 14 Que. S.C. 238.

—Joint curator—Cession de biens—Solidarity.]—Curators to judicial abandonments are administrators of the property thus abandoned. Their office is essentially that of an administrator.—A nomination of joint curators or administrators is legal and valid, and they constitute but one person in the eye of the law, so that a solidarity of liability exists between them, as to all their duties and obligations as such. *Dombrowski* v. *Lefaivre*, 14 Que. S.C. 402.

—Interdit—Remploi—Family council—Arts. 945, 948, 981, 984 C.C.]—The curator of an interdict, institute under a substitution, does not require the authority of a judge, under advice of the family council, to enable him to make a *remploi* of funds from sale of the institute's property.—In case of refusal by the curator to intervene for a *remploi*, the institute may make such *remploi* by authority of the judge, without the advice of the family council. *Daly* v. *Amherst Park Land Co.*, 5 Rev. de Jur. 348, affirming 13 Que. S.C. 516, C.A. Dig. (1898) 147.

—Judicial abandonment—Authority of curator to sue—Leave of Judge—Jurisdiction.]

See ACTION, III.

Interdit — Habitual drunkenness — Wife curatrix—Demand of cession de biens—Authorization.]—See HUSBAND AND WIFE, XI.

—Emancipated minor—Action for principal of obligation—Arts. 319, 320, 322 C.C.]

See INFANT, I.

—Sale of deals—Insolvent vendor—Delivery—Detention for payment.]

See SALE OF GOODS, III.

CUSTOMS.

See REVENUE.

DAMAGES.

— Breach of contract — Sale of goods — Non-delivery.]—In an action of damages for failure to deliver goods at the time specified in the contract, a claim for the difference between the purchase prices of the goods and the prices at which they were selling at the

time when they should have been delivered is not too remote. *Marsle* v. *Leggat*, 8 Que. Q.B. 221, affirmed by Supreme Court, June 5th, 1899.

—Contract—Breach—Proximate damages—Arts. 1074, 1075 C.C.]—Where defendant was sued for damages for delay in fulfilling her obligation to obtain the ratification of a deed of sale, the delay not being shewn to be due to the fraud of defendant, she was only liable for such damages suffered by plaintiff as were the immediate and direct consequence of said delay, and which could have been foreseen at the time of contracting the obligation. Hence, damages claimed on the ground that defendant's delay in obtaining the ratification was the cause of plaintiff's failure to effect a loan, which loan would have enabled him to settle advantageously with certain creditors, and have prevented the institution of legal proceedings against him, and saved him law costs and other expenses, not being the immediate and direct consequence of the defendant's delay, were held not recoverable. *Bélanger* v. *Dupras*, 14 Que. S.C. 193.

—Responsibility — Aggravation of, by unsound health of person injured.]—The person through whose fault an accident resulting in bodily injuries has occurred, is responsible for all the damages suffered by the injured person, although the amount may have been increased in consequence of his weak or unsound constitution. *Loranger* v. *Dominion Transport Co.*, 15 Que. S.C. 195.

—Responsibility—Personal injuries—Weak constitution of person injured—Force majeure.]—Although the damages resulting from personal injuries may have been considerably increased owing to the weak constitution of the person injured, the party in fault is nevertheless responsible for all the damages suffered, plaintiff's earning capacity at the time of the accident being duly taken into account. *Loranger* v. *Dominion Transport Co.*, 15 Que. S.C. 195, followed. *Leclerc* v. *City of Montreal*, 15 Que. S.C. 205.

—Unsuccessful litigation—Injury to other party—Liability to damages—Interest—Good faith—Presumption.]—See EVIDENCE, VII.

—Slander — Proof — Exemplary damages — Persistence in injury.]

See LIBEL AND SLANDER, I.

—Lease—Negligence—Hire of tug—Conditions—Repairs — Compensation—Presumption of fault—Evidence—Measure of damages.]

See NEGLIGENCE, XIV.

— Negligence — Common fault — Division of damages.]—See NEGLIGENCE, IV.

—Personal injury—Cause of accident—Contributory negligence—Liability.]

See NEGLIGENCE, XV.

— Seizure — Irregularity — Opposition à fin d'annuler—Arts. 76, 82, 117 C.C.P.]

See PRACTICE AND PROCEDURE, LIII.

—Sale—Warranty—Breach—Measure of Damages.]—See SALE OF GOODS, XI.

DE BENE ESSE.

—Examination of witness de bene esse.]

See WITNESS.

DEBTOR AND CREDITOR.

I. APPROPRIATION OF PAYMENTS.
II. ARREST OF DEBTOR.
III. ASSIGNMENT.
IV. ATTACHMENT FOR DEBT.
V. ATTACHMENT OF DEBT.
VI. COLLECTION OF DEBTS.
VII. COMPENSATION.
VIII. DISCHARGE OF DEBTOR.
IX. EXAMINATION OF JUDGMENT DEBTOR.
X. FRAUD ON CREDITOR.
XI. PAYMENT OF DEBT.
XII. RECOVERY OF DEBT.
XIII. SEIZURE BEFORE JUDGMENT.

I. APPROPRIATION OF PAYMENTS.

—Error in appropriation—Arts. 1160, 1161 C.C.]—A bank borrowed from the Dominion Government two sums of $100,000 each, giving deposit receipts therefor respectively numbered 323 and 329. Having asked for a further loan of a like amount it was refused, but afterwards the loan was made on O., one of the directors of the bank, becoming personally responsible for repayment, and the receipt for such last loan was numbered 346. The Government having demanded payment of $50,000 on account that sum was transferred in the bank books to the general account of the Government, and a letter from the president to the Finance Department stated that this had been done, enclosed another receipt numbered 358 for $50,000 on special deposit, and concluded, "Please return deposit receipt No. 323—$100,000 now in your possession." Subsequently $50,000 more was paid and a return of receipt No. 358 requested. The bank having failed the Government took proceedings against O. on his guarantee for the last loan made to recover the balance after crediting said payments and dividends received. The defence to these proceedings was that it had been agreed between the bank and O., that any payments made on account of the borrowed money should be first applied to the guaranteed loan and that the president had instructed the accountant so to apply the two sums of $50,000 paid, but he had omitted to do so. The trial Judge gave effect to this objection

and dismissed the information of the Crown:—Held, that as the evidence shewed that the president knew what the accountant had done and did not repudiate it, and as the act was for the benefit of the bank, the latter was bound by it; that the act of the Government in immediately returning the specific deposit receipts when the payments were made was a sufficient act of appropriation by the creditor within Art. 1160 C.C. no appropriation at all having been made by the debtor on the hypothesis of error; and if this were not so the bank could not now annul the imputation made by the accountant unless the Government could be restored to the position it would have been in if no imputation at all had been made, which was impossible, as the Government would then have had an option which could not now be exercised. *The Queen* v. *Ogilvie*, 29 S.C.R. 299, reversing 6 Can. Ex. C.R. 21.

—Prescription—Judicial notice.]—The Court in making imputation of payments according to law is entitled to take notice of prescription which has inured against promissory notes forming part of the claim. *Lunn* v. *Houliston*, 14 Que. S.C. 289.

II. Arrest of Debtor.

—Foreigner temporarily in Ontario—Debt contracted abroad.]—A foreigner, who contracts a debt in the country of his domicile and then comes to this province to stay temporarily, cannot be arrested here in respect of that debt, when in good faith about to leave this province to return home. *Elgie* v. *Butt*, 26 Ont. App. 13.

—Indigent Debtor—Discharge from custody—Examination — "Satisfactory" meaning of — Affidavits—Appeal.]—The expression in s. 9 of the Indigent Debtors' Act, R.S.O. c. 81, "If the matter thereof is deemed satisfactory"—referring to the examination of the debtor—means, "if he fully and credibly gives the information called for by *vivâ voce* questions." The object of the statute and the examination is to test the verity of the statement that the debtor has not wherewith to pay—that he is in fact an indigent debtor—and if he fully and fairly discloses his dealings with his property so as to make it appear that his affidavit is correct, and that he has in truth no means in his possession or under his control to pay any part of the claim then he should be discharged from custody, even though he may have fraudulently disposed of his property, and although his manner of dealing therewith may have been unsatisfactory for that reason:—Held, also, that affidavits could be looked at upon a motion for discharge of the defendant, to supplement the examination, but only as an indulgence where filed after the appeal was launched. *People's Loan and Deposit Co.* v. *Dale*, 18 Ont. Pr. 338.

—Intent to defraud creditors—Temporary absence.]—Where the defendant's place of residence was in Ontario, and he was quitting the province for a temporary purpose, leaving his wife and family behind, and intending to return before the end of the year, and it appeared that he had no property, he was discharged from custody under an order of arrest, on the ground that it could not be said that he was going with intent to defraud creditors. *Palmer* v. *Scott*, 18 Ont. Pr. 368.

—Capias — Secretion of effects by debtor in another province — Lex fori.] — The rules governing the use of the writ of *capias ad respondendum* are those of the place where the arrest under the writ is made; they are those of the *lex fori*, and not those of the *lex loci*. Therefore, the fact that the alleged secretion of effects by a debtor, arrested under a writ of *capias* in the Province of Quebec, took place in another province of the Dominion of Canada, is not a bar to the exercise by the creditor of his remedy by way of *capias* in Quebec, if the debtor be found within the jurisdiction.—The mere knowledge by the creditor issuing the *capias*, that a criminal proceeding had been isued by another creditor, and the fact that the former had contributed to pay the expenses of such criminal proceeding, are not sufficient to rebut the presumption of good faith, so as to deprive the said creditor of the remedy by *capias* against his debtor while the latter is within the jurisdiction. *Gault Co.* v. *Cloutier*, 7 Que. Q.B. 546.

—Contrainte par corps—Judgments for damages for personal injuries—Previous abandonment—Art. 846 C.C.P.]—The defendant cannot, in order to avoid arrest *(contrainte par corps)* on execution of a judgment awarding damages in consequence of personal injuries, invoke an abandonment *(cession de biens)* made by him before the judgment ordering the arrest. *Keating* v. *Burrows*, 8 Que. Q.B. 1.

—Capias—Evidence of intention to defraud—Allegation of criminal acts.]—The fact that a debtor spoke to several persons of going to a foreign country to look after his interest in a certain succession, does not shew intention to abscond with intent to defraud, and does not justify the issue of a writ of *capias*. Allegations of fraudulent appropriations of moneys, which would support a criminal charge, cannot be used to justify the issue of a writ of *capias*, the creditor not being entitled to substitute the latter proceeding for the remedy by criminal process. *Nelson* v. *Lippe*, 14 Que. S.C. 437.

—Capias—Affidavit for.]—An objection taken to an affidavit upon which a *capias* was issued, that it did not shew that any writ of summons was issued at the time it was sworn to, could not be sustained, N.S. Order 44 R. 1, not requiring the affidavit upon which the order for arrest is based to contain such a statement. *Murray* v. *Kaye*, 32 N.S.R. 206.

—Ca. re.—Motion for discharge—Practice.]—Defendant applied to the Court upon affida-

vits denying his intention to leave the province, for an order setting aside a Judge's order for a writ of *ca. re.*, and the writ of *ca. re.* issued thereunder upon which he had been arrested:—Held, (1) The application should have been to discharge the defendant, under s. 6 of 1 & 2 V., c. 110, but an amendment of the notice of motion was allowed. (2) A proposed transit through foreign territory on a journey from one part of the Province to another does not constitute a leaving of the Province sufficient to warrant an arrest. *Semble:* An application to discharge a party arrested under a writ of *ca. re.* need not be made by order *nisi* but may be made by notice of motion. *Coursier* v. *Madden*, 6 B.C.R. 125.

—Ca. re.—Affidavit — Statement of cause of action—Particulars.]—The plaintiff's cause of action should appear in the affidavit leading to an order for a writ of *ca. re.* and a statement in the affidavit that the defendant is indebted to plaintiff in a sum as appears in an exhibit to the affidavit is insufficient. Proceedings to discharge from custody a person arrested under a writ of *capias* should be by summons, and where objections are taken to the proceedings on the ground of irregularity, the specific irregularities should be set out. *Walt* v. *Barber*, 6 B.C.R. 461.

—Ca. re. — Affidavit — Statement of cause of action—Partners.]—K. in 1895 gave two promissory notes to the firm of Lenz & Leiser, and in 1896 one member of the firm died, and the partnership business was continued under the same firm name by the surviving partner and the dead partner's widow. In 1898 the firm sued K. on the notes, and he was arrested on a writ of *ca. re.*, the affidavit leading to the order being made by the surviving partner, who swore that he was a member of the firm of Lenz & Leiser, and that K. was indebted to the firm on the notes, but no mention was made of the notes having been given to the old firm:—Held, on summons to discharge the defendant from custody, that the affidavit was insufficient, as it did not disclose that the firm of Lenz & Leiser is a new and different firm from that in existence when the cause of action accrued. *Lenz* v. *Kirschberg*, 6 B.C.R. 533.

—Claim for interest— Affidavit— Independent causes of action.]—The affidavit for defendant's arrest set out in one paragraph a good cause of action upon a bill of exchange. Another paragraph was as follows: "That the said B. is also indebted to me in the further sum of three dollars and ninety-five cents for money payable by the said —— to me for interest upon money due from the said B. to me and foreborne at interest by me to the said B. at his request":—Held, that it should have appeared how the claim for interest arose, and that it did not sufficiently appear that the interest was claimed in respect of the bill of exchange, but that the affidavit stating one good cause of action, the arrest should not be set aside [Forbes, Co. J.]. *Forster* v. *Blizzard*, 35 C.L.J. 88.

—Arrest for fees for medical services—Affidavit to hold to bail.]—Defendant was arrested on a *capias* for services performed and medicines supplied by the plaintiff as physician, surgeon and apothecary:—Held, that the affidavit on which the *capias* was founded was insufficient for not alleging that the plaintiff was a duly registered physician. *Turner* v. *Connolly*, 35 C.L.J. 540.

—Affidavit to hold to bail—Claim for interest on bill of exchange—Liquidated damages.]—The defendant was arrested in an action to recover principal and interest, from date of maturity, of a bill of exchange. The affidavit to hold to bail contained a clause equivalent to the common count for interest. Application was made on behalf of the defendant to have the arrest set aside because the affidavit to hold to bail did not state that there was an express agreement to pay interest. The plaintiff's counsel contended that s. 57 of the Bills of Exchange Act of 1890 made interest for non-payment of a bill at maturity, from the time of such non-payment, liquidated damages.—Held, that under the Bills of Exchange Act the interest therein allowed is liquidated damages; that those liable to pay the same can be arrested, and therefore an affidavit to hold to bail need not set forth an express agreement to pay interest [Forbes, Co. J.]. *Jenkins* v. *Arnold-Fortescue*, 19 C.L.T. (Occ. N.) 42.

III. Assignment.

—Fraudulent conveyance—Consideration—Untrue statement—Onus of proof—Sheriff.]—*Gignac* v. *Iler*, 25 Ont. App. 393, affirming 29 Ont. R. 147, and C.A. Dig. (1898) 155.

—Compensation—Transfer—Signification—Arts 1192, 1571 C.C.]—A transfer of a hypothecary claim, registered but not signified on the debtor, does not prevent compensation taking place between the transferor and his debtor, in respect of a judgment obtained by the latter against the transferor before signification of the transfer. *Palliser* v. *Burns*, 15 Que. S.C. 256.

—Transfer of obligation—Acceptance of signification by debtor—Action on transfer—Power of attorney.]—The debtor intervened in the deed of transfer of an obligation, and accepted signification. In an action by the transferee against the debtor:—Held, that the transferee was not bound to register the power of attorney to the person who represented her in the matter, or to produce with her action a copy of the power of attorney—the debtor after accepting the transfer being without interest or right in an action by the transferee to question the validity of the power of attorney, or whether any such power of attorney existed. *Cox* v. *Lecavalier*, 15 Que. S.C. 350.

—Fraudulent conveyance—Company— Fictitious incorporation—Election of remedies.]

See BANKRUPTCY AND INSOLVENCY, III.

—Bankruptcy and insolvency—Assignments and preferences—Payment of money—Cheque.]

See BANKRUPTCY AND INSOLVENCY, III.
And see CRIMINAL LAW, IX.

IV. ATTACHMENT FOR DEBT.

—Saisie-arrêt of schooner—Latest equipment—Action in rem.]—See LIEN, IV.

V. ATTACHMENT OF DEBT.

—Sheriff—Seizure of salary.]—No portion of the salary of a sheriff can be seized. *Denton* v. *Arpin*, 14 Que. S.C. 415.

—Devise à titre d'aliments—Seizure—Art. 599 C.C.P.]—Property devised for purposes of maintenance (*à titre d'aliments*) can be seized for the cost of support owed by the legatee to a third party. *Crédit Foncier* v. *Martin*, 15 Que. S.C. 160.

—Saisie-arrêt — Contestation by tiers-saisi—Art. 682 C.C.P.]—The *tiers-saisi*, when a *saisie-arrêt* has been served on him, has only to make disclosure, and cannot himself contest the merits of the *saisie-arrêt*. *Cross* v. *Prévost*, 15 Que. S.C. 189.

—Seizure of wages—Public officer — Art. 599 C.C.P.]—A city assessor is a "public officer" within the meaning of Art. 599 C.C.P., and his salary is not liable to seizure by garnishment. *Stewart* v. *Euard*, 15 Que. S.C. 262.

—Husband working for wife—Wages—Saisie-arrêt.]—A husband who works for his wife (in this case the husband failed and his wife continued the business, he working for her, but apparently on his own account) is not entitled to wages, and his creditors cannot, by *saisie arrêt* in the hands of his wife, recover the value of his services. *St. Pierre* v. *Towle*, 15 Que. S.C. 322.

—Cession de biens—Costs against curator—Recovery—Saisie-Arrêt.]—The insolvent and his attorney, creditors for costs against the curator to the abandonment (*cession de biens*) cannot attach (*saisir-arrêter*) the debts due by the debtors of the insolvent but should apply to the judge for an order directing the curator, under penalty for contempt of court, to pay these costs as expenses of the administration provided he has sufficient funds in his hands. *Dancose* v. *Bissonnette*, 15 Que. S.C. 461.

—Marriage contract — Usufruct on husband's lands—Eventual usufruct—Judicial sale subject to—Sheriff's deed—Declaration of existing usufruct—Creditor of wife.]

See SALE OF LAND, XII.

—Seaman's wages—Second in command—Seizure—Assignment.]—See SHIPPING, XIII.

VI. COLLECTION OF DEBTS.

—Collections Act (N.S.)—Teacher in common schools — Salary— Equitable execution — Discretion of judge—Chose in action.]—Under the provisions of the Public Instruction Act of 1895, c. 1, s. 37, the sum of money specified therein is paid by the government of the province to teachers employed in the public schools, in proportion to the number of days taught. By s. 39, the distribution of the money so appropriated is made semi-annually, through the inspectors of schools. Plaintiff, who had obtained an assignment from defendant, under the provisions of the Collections Act, subsequently applied to a Judge at Chambers for, and obtained, an order for the appointment of a receiver, for the purpose of obtaining payment of the sum of $50 or $60, which defendant, as a teacher in one of the schools of the province, was entitled to receive from the inspector of his district, under the provisions of the Act quoted. Defendant's contract for the performance of his duties being made with the trustees of the school section in which he was employed, and there being no contract directly or indirectly between the defendant and the government:—Held, that defendant's salary was not exempt from attachment for debt under the principle of the cases applicable to officers employed in the public service; Held, that the amount coming to defendant being one that could not be reached by ordinary legal execution, or garnishee process, plaintiff was entitled to the equitable relief sought; Held, that whether it was "just and convenient" to grant plaintiff's motion was a matter in the discretion of the judge with which the court ought not to interfere except for good cause; Held, that the smallness of the amount involved was not sufficient ground for such interference; *Quære*, whether the amount which defendant was entitled to receive from the inspector was a chose in action assignable for which the assignee would have a right of action in his own name. *Fraser* v. *McArthur*, 12 N.S.R., 498, referred to. *McKay* v. *The Municipality of Cape Breton*, 18 S.C.R. 639, distinguished. *Fisher* v. *Cook*, 32 N.S.R. 226.

— Prohibition — B.C. Small Debts Act—Magistrates' decision not given in open court—Waiver.]

See PROHIBITION.

VII. COMPENSATION.

—Transfer—Signification—Arts. 1192, 1571, C.C.]—A transfer of a hypothecary claim, registered, but not signified on the debtor, does not prevent compensation taking place between the transferor and his debtor, in respect of a judgment obtained by the latter against the transferor before signification of the transfer. *Palliser* v. *Burns*, 15 Que. S.C. 256.

—Landlord and tenant—Agreement by tenant to board landlord—Payment of rent by lodging—Rights of landlord's creditors.] — One of the defendants, credito of one-fifth of the rent payable by the *tiers-saisi*, agreed to lodge with the latter who was to retain, in payment for such lodging, the portion of rent due to the lodger, such arrangement to continue as long as the defendant should lodge with the *tiers-saisi*. The plaintiff, a creditor of said defendant, caused to be seized, in the hands of the *tiers-saisi*, the portion of rent due said defendant:—Held, that in the absence of proof that this arrangement had been made with the concerted design of preventing the creditors of the defendant from exercising their recourse against him the *tiers-saisi* could oppose to the plaintiff's demand the conventional counterclaim arising from the arrangement with the defendant and that so long as the latter should continue to lodge with him. But the duration of this arrangement being uncertain the Court declared the seizure effective in case the arrangement as to lodging should come to an end before the expiration of the lease. *Manufacturers' Life Ins. Co.* v. *DeBellefeuille*, 15 Que. S.C. 431.

—Firm of attorneys—Payment to a member—Set-off.]—A person who is sued for a debt due by him to a firm of attorneys cannot set off against the claim of the firm the amount of a promissory note given by him to a member of the firm, for which he took his personal receipt, particularly where it is proved that the note was given for a purpose not connected with the firm's business. *Taylor* v. *Lilley*, 15 Que. S.C. 457.

— Action on contracts in writing — Claim for board, etc.]—An account for the cost of board, washing and rent of a room extending over thirteen years cannot be set up in compensation of a debt arising out of promissory notes and written contracts entered into during and subsequent to such period, especially when it forms the subject of an action pending between the same parties. *Nand* v. *Marcotte*, 2 Que. P.R. 145, affirming in the result 15 Que. S.C. 360.

VIII. Dicharge of Debtor.

—Compromise of claim after arrest—Evidence of knowledge and consent.] — It appeared that, after defendant's arrest under execution, steps were taken to secure his discharge under the Act for the Relief of Indigent Debtors, but, before the examination took place, a compromise was arranged between the agent of plaintiff's solicitor and defendant's solicitor, by which defendant was allowed his liberty on giving promissory notes for the sum of $300, payable in 3, 9, 12 and 18 months, and that, seven months afterward, prior to the issue of the execution sought to be set aside, the sum of $150 had been received by plaintiff's solicitor from defendant's solicitor on account of these notes. Plaintiff's solicitor denied that he had authorized the making of the compromise or the acceptance of the notes:—Held, that the acceptanee of the $150 paid to plaintiff's solicitor, with knowledge that defendant was no longer under arrest, was strong evidence of consent; Held, also, that the statement in the affidavit of plaintiff's solicitor that "from the time the execution was issued in 1888 until a few weeks ago I was not aware that the defendant was able to respond the said judgment or I would have endeavoured to enforce payment of it," was inconsistent with the belief that defendant was being held under execution. *Dunbar* v. *Ross*, 32 N.S.R. 222.

—N.S. Collection Act—Amount of costs not mentioned in commitment.]—Application for discharge of defendant under c. 117, R.S. The defendant was confined in jail under a warrant made under the Collection Act, N.S., 1894, c. 4, s. 9, and amendment thereto, 1898, c. 38, s. 2, and the imprisonment was made terminable upon the defendant paying "the amount due on the judgment and all costs" without stating the amount of costs:—Held (per Townshend, J. in Chambers), that the warrant was bad. *Thorne* v. *Benson*, 35 C.L.J. 696.

IX. Examination of Judgment Debtor.

— Assignment for benefit of creditors.]—The making of an assignment for the benefit of creditors under R.S.O., c. 147, does not deprive a judgment creditor of the assignor of his right to examine him, although it may in some cases furnish a reason why an order for such examination should not be made. *McEachren* v. *Gordon*, 18 Ont. Pr. 459.

— Foreign debtor — Summons.] — Judgment creditors had summoned, by way of *saisie-arrêt* after judgment, a foreign company to come to Montreal and disclose what it might owe to the judgment debtor. The writ was served on the company at Toronto where it had its principal place of business:—Held, that the judgment creditors could not compel the company to come to and make such disclosure and thus to effect a seizure outside of the Province of Quebec where the jurisdiction of its Courts did not extend, and that the summons was void. *Masterman* v. *Masure*, 15 Que. S.C. 433.

—Disclosure—Refusal of discharge—59 V., c. 28, (N.B.).]—On the hearing before a Clerk of the Peace, of a debtor's application for his discharge from custody:—Held, that the non-production of his books, which were not called for or inquired after, is no bar to his discharge.—That the debtor having sworn he had no real or personal property, and had not paid any debts since his arrest or given any preferences, the question: "Have you at any time transferred any property intending to defraud the plaintiff?" and the answer: "I have not," were immaterial and unnecessary.—That the debtor could not be refused his discharge, because previous to his arrest he had sold a horse, but he was

not examined as to the disposition of the proceeds of the sale.—That the value of a debt due the debtor was a question of fact to be determined by the examining officer.—That the answer "No one in particular," given to a question as to the persons from whom he expected to get two notes he had promised to give creditor's agent, was sufficient. *Ex parte Conant, In re Starkey*, 34 N.B.R. 195.

— Disclosure — Discharge — Condition precedent.]—On the hearing of a debtor's application for examination and discharge from custody, under the provisions of Acts of Assembly, 59 V., c. 28, s. 7, where debtor disclosed real estate:—Held, that the making of a memorandum to be filed in the office of the Registrar of Deeds as provided by s. 11 of said Act, when not asked for, is not a condition precedent to debtor's discharge. *Ex parte Conant, In re Starkey*, 34 N.B.R. 198.

—B. C. Rule 486—Examination where execution not returned.]—A judgment debtor is examinable under Rule 486 notwithstanding that a *fi. fa.* in the sheriff's hands has not yet been returned *nulla bona*. *Steele* v. *Pioneer Trading Corporation*, 6 B.C.R. 158.

—Judgment for costs only—R.S.B.C., c. 10, s. 19 and Rule 486.]—A person against whom a judgment has been recovered for costs only, is examinable as a judgment debtor under Rule 486, but not under R.S.B.C., c. 10, s. 19. *Griffiths* v. *Canonica*, 5 B.C.R., followed. *Drosdowitz* v. *Manchester Fire Assurance Co.*, 6 B.C.R. 269.

X. Fraud on Creditor.

—Criminal Code, s. 369, s.s. (b)—Conviction—Absence of proof of original fraud on creditor.]

See Criminal Law, IV.

XI. Payment of Debt.

—Transmission by mail—Registered letter—Loss—Negligence.]—The loss of a sum of money sent by registered letter falls upon the sender even when the addressee (*destinataire*) had demanded that it be sent to him if he did not designate a mode of transmission and even when the addressee, on being informed that a registered letter bearing his address is at the post-office where he lives, had neglected to claim it promptly. *Bergeron* v. *Gélinas*, 15 Que. S.C. 346.

—Promissory note—Debt included in a composition—Consideration—Natural obligation.]—The defendant effected a composition with his creditors, including the plaintiff, and about a year afterwards, wishing to obtain further credit from the plaintiff, he voluntarily gave him a note for $100, for which he received no new consideration:—Held, that the natural obligation still existing on the part of the defendant to pay the balance of the old debt was a good and valid consideration for the note, and the amount thereof might be recovered in an action at law. *Bédard* v. *Chaput*, 15 Que. S.C. 572.

XII Recovery of Debt.

—Simple warranty—Personal debtor—Assumption of debt by third party—Exception dilatorie.]

See Action, XXVII.

—Husband and wife—Obligation of wife—Dissolution of community—Liability of wife after—Arts. 1301, 1369, 1370, 1371 C.C.]

See Husband and Wife, V.

XIII. Seizure Before Judgment.

—Accommodation note—Action by indorser—Saisie conservatorie—Special privilege—Personal debt.]—The indorser of accommodation notes, who sues the maker, alleging that the latter has had these notes discounted, one of which is matured and unpaid, that he is insolvent and in bankruptcy, that he secretes his goods with intent to defraud his creditors, and refuses to make an assignment, although, as a trader, required to do so, and who prays that the said maker be held to indemnify him as indorser, either by paying the notes, or by depositing the amount in Court, cannot, on account of these facts, accompany his action with a conservatory attachment against the goods of the defendant, such attachment being only permitted when the seizing creditor has a special privilege which he wishes to preserve.—The facts alleged justifying the *saisie-arrêt* before judgment,—the claim of the surety under Art. 1953 C.C., for his indemnity by the debtor, being a personal debt within the meaning of Art. 931 C.C.P.—the seizure made by the appellants would avail as a *saisie-arrêt* before judgment, notwithstanding the name of "*saisie-conservatoire*" which they had given it. *Bourassa* v. *Lorigan*, 8 Que. Q.B. 289.

DEDICATION.

—Highway—Use—Evidence.]

See Municipal Corporations, XI.

DEED.

—Duress—Undue pressure—Trust property.]—The owner of land having died intestate leaving several children, one of them, W. R., received from the others a deed conveying to him the entire title in the land in consideration of his paying all debts against the intestate estate and those of a deceased brother. Subsequently, W. R. borrowed money from his sister and gave her a deed of the land, on learning which B., a creditor of W. R., accused the latter of fraud and threatened him with criminal prosecution, whereupon he induced his sister to execute a re-conveyance of the land to him and then gave a mortgage to B. The re-conveyance

not having been properly acknowledged for registry purposes was returned to the sister to have the defect remedied, but she had taken legal advice in the meantime and destroyed the deed. B. then brought an action against W. R. and his sister to have the deed to the latter set aside and his mortgage declared a lien on the land:—Held, that the sister of W. R. was entitled to a first lien on the land for the money lent to her brother; that the deed of re-conveyance to W. R. had been obtained by undue influence and pressure, and should be set aside, and B. should not be allowed to set it up.—B. claiming to be a creditor of the father and deceased brother of the defendants wished to enforce the provision in the deed to W. R. by his brothers and sister for payment of the debts of the father and brother. Held, that this relief was not asked in the action, and if it had been the said provision was a mere contract between the parties to the deed of which a third party could not call for execution, no trust having been created for the creditors of the deceased father and brother. *Burris* v. *Rhind*, 29 S.C.R. 498, affirming 30 N.S.R. 405.

—Delivery—Retention by grantor—Presumption—Rebuttal.]—The fact that a deed, after it has been signed and sealed by the grantor, is retained in the latter's possession is not sufficient evidence that it was never so delivered as to take effect as a duly-executed instrument. The evidence in favour of the due execution of such a deed is not rebutted by the facts that it comprised all the grantor's property, and that while it professed to dispose of such property immediately the grantor retained the possession and enjoyment of it until his death. *Zwicker* v. *Zwicker*, 29 S.C.R. 527, reversing 31 N.S.R. 333.

—Construction—Partition—Charge upon lands.]—A deed for the partition of land held in common contained a conveyance of a portion thereof to M. W., for certain considerations therein recited of which one was the condition that she should procure from her minor children, upon their coming of age, the necessary quit-claim deeds for the release of their interests in another portion of the land in question appointed and conveyed to her co-partners, and the amount of certain payments of money then made for the purpose of effectuating the partition, was by the deed of partition declared to remain a lien on that portion of the land thereby conveyed to M. W. until such quit-claim should have been obtained and delivered to her said co-partners:—Held, that the said recital was sufficient to charge that portion of the said land so conveyed to M. W. with the amount of the said payments of money as a security for the due execution and delivery of the quit-claims in conformity with the condition stipulated in the deed of partition. *Green* v. *Ward*, 29 S.C.R. 572.

—Mistake—Rectification—Competing Purchasers—Priorities—Quit claim deed—Purchaser for value.]—Rectification decreed of misdescription in conveyance of land arising from mutual mistake of grantor and grantee, as against a subsequent purchaser with notice of mistake, but without costs. Bill sustained for the rectification of a mortgage, and for the foreclosure and sale of the mortgaged premises. A purchaser of a lot of land taking under a conveyance describing by mistake of grantor and grantee a different lot, has merely an equitable right to have the conveyance rectified, as distinguished from an equitable estate, and the maxim *qui prior est tempore portior est jure* has no application as against a subsequent purchaser for value without notice. Where the owner of the fee simple grants, bargains, sells, assigns, and conveys, all his interest in land, to have and to hold the same unto the purchaser, his heirs and assigns, the conveyance is not a deed of quit claim, but transfers to the purchaser all the interest of the grantor sufficient to sustain a claim of purchase for value. *King* v. *Keith*, 1 N.B. Eq. 538.

—Claim to realty—Limitation—Deed of appointment—Accrual of right—Future estate.]

See LIMITATION OF ACTIONS, IV.

DELAYS.

See PRACTICE AND PROCEDURE, XVIII.

DEMURRER.

See PLEADING, V.

DEVOLUTION OF ESTATES ACT.

—Dower — Election — R.S.O., c. 127, s. 4.]—Where in the administration by the court of the estate of an intestate, lands have been sold and the purchase money paid into court and not distributed, the widow may, although more than twelve months have elapsed since the death of her husband, elect to take in lieu of dower her distributive share under the Devolution of Estates Act. *Baker* v. *Stuart*, 25 Ont. App. 445, affirming 29 Ont. R. 388 and C. A. Dig. (1898) 169.

—Application—Executor deriving title under will and the Ontario Trustee Act.]

See EXECUTORS AND ADMINISTRATORS, VII.

DISCONTINUANCE.

See ACTION, VIII.

DISCOVERY.

—Examination on.]

See PRACTICE AND PROCEDURE, XX.

DISTRIBUTION.

—Report of distribution—Contestation—Procedure.]—On a contestation of a report of distribution, which is merely a demurrer to the conclusions of the prothonotary, a party answering will not be allowed to allege new facts, nor to produce exhibits not before the prothonotary when the report was prepared. *Hinman* v. *House*, 15 Que. S.C. 193.

—Cautiounement—Hypothec—Art. 1963 C. C.]—A collocated creditor obliged to give security *(cautiounement)* to the purchaser will be allowed to substitute for this security a first hypothec on an unchanged *(non grevé)* immovable of a value deemed sufficient by the court. *Leroux* v. *McIntosh*, 2 Que. P.R. 83.

DITCHES AND WATERCOURSES.

See MUNICIPAL CORPORATIONS, VII.

DIVISION COURTS.

— Jurisdiction — Notice disputing — Extending time for prohibition.]—A Division Court Judge has no power after the expiry of the time limited by s. 205 of the Division Courts Act, R.S.O. c. 60, for the giving of notice of intention to contest the jurisdiction of the court, to grant leave to file a notice disputing it. *Re McLean* v. *Osgoode*, 30 Ont. R. 436.

—Jurisdiction—Prohibition.]—After the recovery of judgment in a Division Court against the primary debtor and garnishee, but before the payment of the amount recovered, the debtor made an assignment for the benefit of creditors under R.S.O. c 147, whereupon an application was made by the garnishee to the Division Court Judge for an order under s. 200 of R.S.O. c. 60, discharging the debt from the attachment, which was refused:—Held, that the matter being one within the jurisdiction of the judge prohibition would not lie. *Re Dyer* v. *Evans*, 30 Ont. R. 638.

— Master and servant — R.S.O. c. 157 — Action for wages — Justices of the Peace — Costs — Appeal.]—See MASTER AND SERVANT, I.

—Interest under will—Interference with discretion of executors by order of Division Court—Prohibition.]—See RECEIVER.

DIVISIONAL COURT.

See APPEAL, XI (*e*.)

DOMICILE.

—Change of residence—Security for costs.]

See COSTS, XVI.

—Arrest of foreigner for debt contracted in another province.]

See DEBTOR AND CREDITOR, II.

—Husband and wife — Matrimonial rights — Residence abroad—Community.]

See HUSBAND AND WIFE, X.
" CONFLICT OF LAWS.

DONATIO MORTIS CAUSA.

—Evidence of delivery to render effective.]—Several years before his death deceased drew up a number of promissory notes, which he placed in envelopes addressed to each of his five children, to whom he said they were intended to be delivered after his death. The envelopes were kept in the possession of, and under the control of, deceased up to within a short time before his death, and changes were made in the contents of the envelopes from time to time. Shortly before his death, when he felt that he was about to die, deceased sent for D. and directed him to take the envelopes out of the box in which they were kept, and seal them up, return them to the box, lock them up, take the keys home with him, and deliver the envelopes to the persons to whom they were addressed, after his death, which he did. In an action to recover notes so delivered:—Held, that D. was merely the agent of deceased, and that there was no delivery sufficient to constitute a good and effectual *donatio mortis causa*. *Foster* v. *Walker*, 32 N.S.R. 156.

DONATION.

—Fraudulent donation — Contemplated suit—Failure to register—Action paulienne—Contestation of opposition—Mis en cause—Arts. 804, 805, 806, 809 C.C.]—The plaintiff had a right of passage over defendant's land. Differences arose between them as to the site of this passage which it was evident could only be settled by an action. Before the action was brought but while it was *engerme* the defendant donated all his property to his son so as to render himself worth nothing and protect such property from being taken for payment of costs in case he was defeated in the action. The donation was not registered. The plaintiff brought his action and obtained judgment for the passage on the site he claimed, with costs. Three days after judgment was given the donation was registered. Plaintiff, for the costs, seized as still the defendant's property that which he had donated to his son who had had no actual delivery nor public possession thereof before the registry of the donation:—Held, that the claim for costs, as that for the right of way, went back to a time prior to the donation and the plaintiff could attack the donation as in fraud of claim for costs.—The registration of donations is necessary not only for immovables but also for movables, and not only as against third parties acquiring the property but even as against chirographic and subsequent creditors of the donor.—A donation cannot be set up by the donee against the

chirographic creditors of the donor subsequent to the donation but after its registry, even in case of a donation of movables, if the donee has not, in the latter case, had actual delivery and public possession.—Failure to register a donation, even of movables, raises a presumption of fraud and simulation.—Registration of a donation has no retroactive effect, that is, it is only valid as against creditors, etc., subsequent to the registry.—Admitting that the *opposant* (donee) may have had possession at the time of the seizure, he had none before the donation was registered, and such possession formed part of a fraudulent agreement between the *opposant* and the defendant to the detriment of the plaintiff; plaintiff had a right to seize the property as belonging to the defendant without regard to such fraudulent possession and without first resorting to the *action paulienne*.—It was not necessary for the plaintiff, in order to contest this opposition and invoke the fraud and nullity of the donation as against him, to bring any other parties into the cause. *Bouchard* v. *Beaulieu*, 14 Que. S.C. 483.

—Gifts inter vivos—Acceptance—Gift of movable—Possession—Arts. 776, 2194, 2268 C.C.]—The gift of a movable, accompanied by delivery, may be made and accepted by verbal agreement (Art. 776 C.C.), and possession of a movable by a person as owner creates a presumption of legal title (Arts. 2194, 2268 C.C.), which presumption, as regards the chair claimed in the present case, had not been rebutted by the plaintiff. *Roy* v. *Garneau*, 15 Que. S.C. 181.

—Gifts inter vivos—Acceptance on behalf of minors—Opposition à fin d'annuler.]—A person, not insolvent, may lawfully make a gift to his child, and that gift may lawfully take the form of a deed of sale to such child, in purchasing for and on behalf of the child. But in order to make the child proprietor of the property given, there must be a lawful acceptance of the gift by or on behalf of the child. *Turgeon* v. *Guay*, 15 Que. S.C. 332.

— Railway — Expropriation — Application of statute—Registry laws—Construction of agreement.]—See CONTRACT, VI. (*c*).

DOWER.

—Election—R.S.O. c. 127, s. 4.]—Where in the administration by the Court of the estate of an intestate, lands have been sold and the purchase money paid into Court and not distributed, the widow may, although more than twelve months have elapsed since the death of her husband, elect to take in lieu of dower her distributive share under the Devolution of Estates Act. *Baker* v. *Stuart*, 25 Ont. App. 445, affirming 29 Ont. R. 388 and C.A. Dig. (1898), 175.

—Conveyance of land free from—Concurrence of wife—R.S.O. c. 164, s. 12—Construction of—Ex parte application—Notice—Advertisement.]—An order under s. 12 of the Dower Act, R.S.O., c. 164, dispensing with the concurrence of a landowner's wife for the purpose of barring her dower, where he is desirous of selling free from dower, is made by the judge as *persona designata*, and is not subject to appeal. Great care should, therefore, be taken to ascertain that the case made by an applicant comes clearly within its provisions, and an order should not be made *ex parte* unless under very exceptional, if under any, circumstances. The words "where the wife of an owner of land has been living apart from him for two years under such circumstances as by law disentitle her to alimony," do not require more to be shewn than that the wife has been living apart from her husband for two years, and that the circumstances under which she has been living apart from him are such that she is not entitled to claim alimony. Leave given to serve notice on a missing wife by advertisement in a newspaper if further search for her should not prove successful. *Re King*, 18 Ont. Pr. 365.

—Husband and wife—Separation deed—Trustees—Covenant as to release of dower—Construction of.]—See HUSBAND AND WIFE, XIV.

DRAINAGE.

See MUNICIPAL CORPORATIONS.
" WATERS AND WATERCOURSES.

DURESS.

—Conveyance—Threat of criminal prosecution.]

See DEED.
" CONTRACT.

EASEMENT.

—Mill-dam—Easement in land of lower level—Servitude.]

See NEGLIGENCE, II.
" SERVITUDE.

ECCLESIASTICAL LAW.

—Quo warranto—Erection of parishes—Churchwardens with no secular functions—Fabrique, its creation.]—It is not necessary that a parish should have been civilly erected in order to enable it to possess a Fabrique, elect churchwardens, and constitute a corporation having power to sue and be sued.—Purely ecclesiastical officials in a parish canonically erected, whose functions are merely honorary, or who are connected only with the conduct of the religious affairs of the church, are not to be deemed public officers or officers of a public corporation exposed to a *quo warranto*. *Ferland* v. *Poulin*, 14 Que. S.C. 60.

EDITS ET ORDOUNANCES.

—Edit des Secondes noces—Repeal—41 Geo. 3, c. 4—Art. 831 C.C.]—See STATUTE, IV.

EJECTMENT.

—Landlord and Tenant—Parties—Judgment—Sub-tenants.]—In an action by a landlord for possession of the premises, it is not necessary to make sub-tenants in actual possession parties defendant, and a judgment for possession may be given against the tenant under which the sub-tenants must go out. *Synod of Toronto* v. *Fisken*, 29 Ont. R. 738.

ELECTION LAW.

—Prohibition Plebiscite Act of 1898, s. 6—Dominion Elections Act, s. 83—Polling day—Sale of liquor.]—The effect of s. 6 of the Prohibition Plebiscite Act of 1898 was to make the disposition of s. 83 of the Dominion Elections Act applicable to the taking of the vote under the former Act, and the sale of intoxicating liquor within any polling district on polling day was prohibited. *Timmis* v. *Hillman*, 15 Que. S.C. 365.

And see MUNICIPAL CORPORATIONS.
" PARLIAMENTARY ELECTIONS.

ELECTRIC COMPANY.

—Exclusive franchise—Municipal by-law—Restraint of trade—B.N.A. Act, s. 91, s.s. 2—58 V., c. 69, s. 24 (P.Q.).]

See CONSTITUTIONAL LAW, IV. (*b*).

ELECTRIC RAILWAY.

—Exclusive franchise—By-law—Powers of legislature.]—See CONSTITUTIONAL LAW, IV. (*b*).

EMINENT DOMAIN.

See CROWN, I.

ENGINEER.

—Contract making employer's engineer sole arbiter—Construction.]

See CONTRACT, VI. (*a*).

EQUITABLE ASSIGNMENT.

—Appropriation—Order on particular fund.]—A present appropriation, by order, of a particular fund not yet realized operates as an equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect in equity. *Heyd* v. *Millar*, 29 Ont. R. 735.

—Designation of funds—Alternative—Notice—Agreement.]—A contractor, having done work under his contract with the defendants, and having brought an action against them for the contract price and for extra work, gave the plaintiff the following order:—"S. Baltzer, Esq., Reeve, Col. South. Please pay William Jackson Quick the sum of $100 on account of my contract on the Richmond drain outlet." Nearly a year afterwards—the action having been in the meantime referred and another action brought by the contractor against the defendants for damages for overflowing his land—he gave the plaintiff a second order as follows:—"To the Reeve, Deputy-Reeve, and Councillors of Colchester South. Sirs,—Will you kindly pay to W. J. Quick the sum of $144.25, and charge to my contract on Richmond drain outlet or damage suit." Shortly after this, the referee made his report finding $139.40 to be due to the contractor, after deducting money paid by the defendants before action and the amounts of certain other orders given by him in favour of a number of persons, not including the plaintiff. Each party having appealed from the report, a settlement of both actions was agreed upon and carried out, by which, *inter alia*, the balance of $139.44 was to be applied towards payment of the defendants' costs of the action for damages. Before the making of the agreement the defendants had notice of both the orders given to the plaintiff:—Held, that both the orders were good equitable assignments; the second being an assignment of either of two specific funds, and the defendants being bound to treat it as an assignment of the one which did arise. The agreement, carried out as it was, established conclusively that the defendants were indebted to the contractor in $139.44, and, having had notice of the orders before the agreement, they were bound to apply that sum to them, instead of in the manner provided in the agreement. *Quick* v. *Township of Colchester South*, 30 Ont. R. 645.

—Order to pay a particular sum—Accompanying letter designating fund—Bill of Exchange.]

See BILLS OF EXCHANGE AND PROMISSORY NOTES, V.

EQUITABLE ESTATE.

—Assignment of interest in land—Title—Right to possession—Subsequent mortgage—Notice—Limitation of actions—Tenancy at will.]—The plaintiff's father, being in possession of a farm under an unregistered agreement for the sale thereof to him, assigned the agreement and all his interest thereunder by way of security to one who gave a bond to reas-

sign upon repayment of a small sum advanced. Neither the assignment nor the bond was registered. The money was repaid, but there was no reassignment. Subsequently, on the 3rd April, 1886, the father assigned all his interest in the land to the plaintiff for valuable consideration, the plaintiff having no notice or knowledge of the previous assignment. This assignment was duly registered. The plaintiff lived on the farm with his father and mother, whom he had covenanted to maintain during their lives, until July, 1888, when he went away, leaving his parents on the farm, with no definite agreement or understanding, but with the expectation, as he said, that they would remain on the place and make the last two payments under the original agreement, and that when this was done the place would be his. In February, 1891, the father mortgaged the land to the person who had made the first advance, to secure a larger sum, and the mortgage deed was registered. A few days later the original vendor conveyed the land to the father, the purchase money having been paid in full, and the conveyance was registered. In February, 1892, the mortgagee died. In September, 1893, the plaintiff's father conveyed the land absolutely to the administrator of the mortgagee's estate, and this conveyance was also registered. In an action against the administrator and the plaintiff's father to recover possession of the land and for a declaration that the last mentioned conveyance was void and a cloud upon the plaintiff's title:—Held, that the assignment to the plaintiff in 1886 gave him an equitable estate in fee and the right to possession, and after its execution, the father and the son both being on the place, the possession would be attributed to the son. 2. That the registration of that assignment constituted notice to the mortgagee, and the mortgage did not affect the plaintiff's title or right to possession. 3. That after the plaintiff went away in July, 1888, his father had possession under him as tenant at will, and his tenancy did not terminate until July, 1889, and therefore the Real Property Limitation Act had not barred the plaintiff's right at the time this action was begun in 1898. 4. That the plaintiff, having the equitable title and having the owner of the legal estate before the Court, was entitled to recover possession of the land. *Cope* v. *Crichton*, 30 Ont. R. 603.

EQUITABLE EXECUTION.

—Interest in land—Writ of Fi. Fa.—Necessity for amendment—Practice.]—In an action by a judgment creditor for a declaration of the judgment debtor's interest in certain lands held by trustees for him under the provisions of his mother's will and for equitable execution or equitable relief:—Held, that the plaintiff could not succeed, as his execution was not in the sheriff's hands when this action was commenced, and leave to amend so as to claim "on behalf of himself and all other creditors" was refused, as his action was not a class action. *Thomson* v. *Cushing*, 30 Ont. R. 388, affirming 30 Ont. R. 123.

—Order of Master of Titles—Land Titles Act, ss. 91, 92—Order of court—Receiver—Equitable execution.]—Upon the proper construction of s. 92 of the Land Titles Act, R.S.O. c. 138, a person entitled to payment of costs under an order of a Master of Titles made by virtue of s. 91, can have "execution issued" by the proper officer, upon the order and certificate of the Master, without any order of the High Court directing or permitting it; but the words of the section do not include that mode of enforcing payment, by way of a receiver, usually called "equitable execution." And, even if an application to the court were necessary in order to have "execution issued," these words would not include the appointment of a receiver: *In re Shephard*, 43 Ch. D. 131; *Croshaw* v. *Lyndhurst Ship Co.*, [1897] 2 Ch. 154; and *Norburn* v. *Norburn*, [1894] 1 Q.B. 448, followed. *Re Craig and Leslie*, 18 Ont. Pr. 270.

—Garnishment—Queen's Bench Act (Man.), 1895, s. 39, s.s. 11—Rule 742.]—Where A. has sold and conveyed land to B. under an agreement that if B. could at any time re-sell the property for a larger amount he would account to A. for the excess, there is nothing upon which to place a garnishing order at the instance of a creditor of A., as there is neither any debt owing or accruing from the garnishee to the debtor, nor any claim or demand arising out of trust or contract which could be made available by equitable execution, nor would it be proper in such a case to appoint a receiver under s. 39, s.s. 11, of the Queen's Bench Act, 1895. The claims and demands referred to in Rule 742 of the Act as re-enacted by 60 V., c. 4, are those that would be available by equitable execution at the suit of the judgment debtor himself, and not at the suit of the judgment creditor. *Central Bank* v. *Ellis*, 20 Ont. App. 364, followed. *McFadden* v. *Kerr*, 12 Man. R. 487.

—N. S. Collection Act—Teacher in common schools—Salary—Equitable execution.]

See DEBTOR AND CREDITOR, VI.

—Receiver—Interest under will—Interference with discretion of executors—Prohibition—Division Court.]—See RECEIVER.

EQUITY OF REDEMPTION.

See BILLS OF SALE AND CHATTEL MORTGAGES, V.

ESTOPPEL.

—Incorporated company—Action against.]—In an action for repayment of tolls alleged to have been unlawfully collected by a river improve-

ment company, it appeared that the plaintiff had treated the company as a corporation, used its works and paid tolls fixed by the commissioners, and the company had also been sued as a corporation:—Held, that the plaintiff was precluded from impugning the legal existence of the company by claiming that its corporate powers were forfeited. *Hardy Lumber Co.* v. *Pickerel River Improvement Co.*, 29 S.C.R. 211.

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

—Res judicata—Benevolent society—Dispute as to age of applicant.]—After an application for membership in a benevolent association had been accepted a dispute arose as to the applicant's age, and an action was brought by him to compel the association to issue to him a certificate of membership. This action was settled, the association accepting an affidavit of the applicant's brother as proof of his age, and thereupon issuing the certificate of membership. Subsequently, the association brought this action asking for cancellation of the certificate on the ground that the applicant's age was not in fact that stated by his brother:—Held, that nothing less than clear proof by the association of the actual age of the applicant, and of fraud in procuring and making the affidavit, would suffice to undo the settlement and entitle the association to cancellation of the certificate. *Sons of Scotland* v. *Faulkner*, 26 Ont. App. 253.

—Husband and wife—Hypothecary deed of wife—Declaration in.]—The declaration of a wife in an hypothecary deed that a house was built for her and she was to pay for it, does not prevent her, in an action to annul the deed as having been agreed to for her husband in contravention of Art. 1301 C.C., from pleading that the house was built for her husband, who was to pay for it. *Cossette* v. *Vinet*, 7 Que. Q.B. 512.

—Canada Temperance Act—Information laid before two justices—Summons—Estoppel.]

See CANADA TEMPERANCE ACT, III.

EVIDENCE.

I. ADMISSIBILITY.

—Death of witness before cross-examination.]—Held, upon a review of the authorities, that the depositions of the defendant taken on his own behalf upon a reference were admissible in evidence, notwithstanding that he had died pending an adjournment of the reference, prior to cross-examination, so that the plaintiff had been deprived of the opportunity of cross-examining him. *Randall* v. *Atkinson*, 30 Ont. R. 242, affirmed by Divisional Court, 30 Ont. R. 620.

—Husband and wife—Examination of consort as witness—Art. 314 C.C.P.]—Where husband and wife were separated as to property, and one of the consorts has, as agent, administered property belonging to the other, the consort who has so administered may be examined as a witness in behalf of the other in relation to any fact connected with such administration, provided the Court be of opinion, in view of the circumstances of the case, that it is just and advisable to order such examination. *Lunn* v. *Houliston*, 14 Que. S.C. 289.

—Sale of real property—Writing sous seing privé—False representations—Affidavit—Art. 1223 C.C.—Art. 145 C.C.P. (old text).]—Where a demand is based on a writing *sous seing privé* and the defendant pleads, admitting his signature, but adding that he was induced to sign the writing by false representations on the part of the plaintiff's agent as to the contents of the document signed, an affidavit by the defendant under Article 145 C.C.P. (old text) is not necessary and parol evidence is admissible in support of the plea. *Péloquin* v. *Genser*, 14 Que. S.C. 538, reversing 12 Que. S.C. 229, C.A. Dig. (1898) 347.

II. COMMENCEMENT OF PROOF IN WRITING.

—Receipt for money—Terms—Onus.]—A writing, which renders probable that which a litigant desires to prove, constitutes a *commencement de preuve per écrit*. In this case a receipt for money from Fortin to Guay, shewing the use Fortin was to make of such money (make a legal tender to a third party), afforded *primâ facie* evidence that the money belonged to Guay and put on the opposite party the onus of proof that such was not the case. *Blanchet* v. *Roy*, 14 Que. S.C. 402.

— Contract— Lease— Proof against authentic lease.]—Where the lessee during nearly three years paid rent at the rate of $29 per month, and accepted receipts for the money paid as said rental, such receipts, as well as the admissions of defendant, constituted a commencement of proof in writing to contradict the terms of the authentic lease by which

the rent was declared to be $15 per month, and the evidence of the lessor was sufficient to complete the proof. *Beauchamp* v. *Beauchamp*, 14 Que. S.C. 427.

—Interruption of prescription—Art. 316 C.C.P.]—In a cause for a sum of $50 and over, it is not necessary that there should be a commencement of proof in writing to establish by witnesses the interruption of the prescription. *Remillard* v. *Moisau*, 15 Que. S.C. 622.

III. Discovery.

—Examination for Discovery—How conducted.]—An examination for discovery should be conducted as an examination in chief, and not as a cross-examination. *Carroll* v. *The Golden Cache Mines Company*, 6 B.C.R. 354.

IV. Expert Evidence.

—Expert witnesses—Permission to view premises.]—In an action for work done in some houses according to a contract, subject to the approval of experts, the plaintiff will be allowed to send expert witnesses to view the houses in which the said work is supposed to have been done, in order to enable them to give intelligently their testimony in the cause. *Mackay* v. *Frappier*, 2 Que. P.R. 82.

—Alteration in promissory note—Expert witness.]

See Bills of Exchange and Promissory Notes, IV.

V. Incrimination.

—Criminal law—Witness indicted as receiver of stolen goods.]—A witness who is not a party to the indictment for theft submitted to the jury, cannot be excused from answering questions on the ground that he himself is indicted with another as receiver of the goods stolen, and that his answers might incriminate him; but his objection shall be noted and his evidence should not be used against him at his trial. *The Queen* v. *McLinchy*, 2 Can. Cr. Cas. 416, 8 Que. Q.B. 166.

VI. Judicial Notice.

—Imputation of payments—Prescription.]—The Court in making imputation of payments according to law is entitled to take notice of prescription which has inured against promissory notes forming part of the claim. *Lunn* v. *Houliston*, 14 Que. S.C. 289.

VII. Necessary Evidence.

—Highway—Dedication—User.]—In order to establish the existence of a public highway by dedication it must appear that there was not only an intention on the part of the owner to dedicate the land for the purposes of a highway but also that the public accepted such dedication by user thereof as a public highway.—In a case where the evidence as to user was conflicting, and the jury found that there had been no public user of the way in question, the Trial Judge disregarded this finding and held that dedication was established by a deed of lease filed in evidence, and this decision was affirmed by the full Court. Held, that as such decision did not take into account the necessity of establishing public user of the locus, it could not stand. *Moore* v. *Woodstock Woollen Mills Co.*, 29 S.C.R. 627.

—Hypothecary action—Signification of transfer—Proof—Arts. 1571, 2127 C.C.]—Where the defendant in a hypothecary action which is brought against him as *tiers détenteur*, based on an alleged transfer of judgment registered against the immovable, denies all knowledge of the judgment and of the registration, and of the transfer to the plaintiff, it is for the latter to prove the transfer and the signification thereof upon the legal representative of the debtor (the debtor being dead at the date thereof), and that the transfer was registered, and a duplicate of the certificate of its registration together with a copy of the transfer was furnished either to the representatives of the debtor or to defendant or his *auteurs* as *tiers détenteurs* of the property hypothecated. Arts. 1571, 2127 C.C. *Larose* v. *Content*, 14 Que. S.C. 263.

—Unsuccessful litigation—Injury to other party—Right to damages—Intervention.]—One D. represented by plaintiffs his executors, had for three years been prevented from withdrawing from the prothonotary a sum of money deposited by the City of Montreal in expropriation proceedings because of an intervention filed by defendant contesting his right to it. The intervention having been dismissed with costs defendant was sued for the interest lost on the money:—Held, that plaintiffs must allege and prove that defendant had brought the intervention in bad faith or through malice, or that he had done so without probable cause or imprudently; that without proof to this effect the presumption would be that defendant acted in the exercise of his lawful right, and that having so acted he was only liable for the costs of the litigation and not to damages incurred or the interest claimed. *McGee* v. *Simms*, 15 Que. S.C. 37.

—Attorney's costs—Judgment for—Affidavit—Copy of taxed bill—Proof.]

—See Costs, XIII.

VIII. Presumption and Onus of Proof.

—Action—Condictio indebiti—Répétition de l'indu—Fictitious claims—Misrepresentation—Payment of claims by Crown—Transfer by payee.]—A company formed for the construction of a subsidized railway having failed, another company undertook to complete it, and the Government of Quebec agreed to pay all the actual debts against the road out of the unearned subsidies. A., the contractor of the former company, presented a claim for $175,000, which was approved of and paid, whereupon he paid over $100,000 of the amount to P. for services performed in organizing the new company and obtaining

payment of the claim. The Government afterwards brought an action against P. to recover back the $100,000 on the ground that A.'s claim was fictitious and was paid on false representations:—Held, that the action must fail if it could not have been maintained against A.; that the onus was on the Crown of proving A.'s claim to be fictitious; and that the Crown not only failed to satisfy such onus, but the evidence clearly established the claim to be a just and reasonable one. *Pacaud* v. *The Queen*, 29 S.C.R. 637.

—Malicious prosecution—Reasonable and probable cause—Burden of proof—Nonsuit.]—In an action for the malicious prosecution of a charge of arson against the plaintiff:—Held, that the burden was on the plaintiff to shew that the defendants acted without reasonable and probable cause; and the evidence of the plaintiff failing in this respect, and enough appearing to satisfy the Court that the defendants took reasonable steps to inform themselves of the facts touching the fire and the apparent complicity of the plaintiff therein, he was properly nonsuited. *Malcolm* v. *Perth Mutual Fire Insurance Co.*, 29 Ont. R. 717, affirming 29 Ont. R. 406 and C.A. Dig. (1898) 264.

—Husband and wife—Hypothecary deed of wife—Declaration in—Estoppel—Authentic deed of notary—Effect of statement in—Presumption.]—The declaration of a wife in an hypothecary deed, that a house had been built for her and she was to pay for it, does not prevent her from pleading, in an action claiming the annulment of the hypothec as agreed to for the husband in contravention of Art. 1301 C. C., that the house had been built for her husband who was to pay for it. The statement of the notary in a formal deed *(acte authentique)* that one of the parties had made declaration of this fact to him, only involves the good faith of the notary's statement and not the truth or sincerity of the declaration which can always be met by proof to the contrary without *inscription de faux*. A violent presumption against the sincerity of the declaration of the wife results from the fact that the wife was obliged to pay the cost of construction on condition that the land on which the house was built, the title of which was in the husband, should become her property, and that the husband had conveyed this land to his mother-in-law who, on the following day, had donated it to her daughter which deeds had subsequently been annulled as constituting a donation between husband and wife. *Cossette* v. *Finet*, 7 Que. Q.B. 512.

—Cheque—Presumption that it was given for value—Burden of proof.]—In the case of cheques and other negotiable instruments, the presumption of law is that they are given for value received, though it be not so expressed in the instrument, and the burden of rebutting such presumption is on the party who denies that value was given. The evidence adduced to rebut the presumption of value must be clear and convincing; mere improbability of the existence of a debt is not sufficient. *Larraway* v. *Harvey*, 14 Que. S.C. 97.

—Lessor and lessee—Verbal lease—Rent at so much a month—Art. 1642 C.C.]—The lease of a house, when no time is specified for its duration, is presumed to be by the month when the rent is at so much a month (Art. 1642 C.C.), and in the present case this presumption of law had not been rebutted by proof of a positive, universal, and acknowledged usage to the contrary. *Corbeil* v. *Marleau*, 14 Que. S.C. 201.

—Accident—Responsibility—Force majeure and cas fortuit.]—The plaintiff was hired by the defendants to discharge a coal-laden steamer; while engaged in the hold of the steamer, a large piece of coal fell off the tub which was being hoisted, and striking him on the back inflicted on him a severe injury. The plaintiff, according to the evidence, was free from fault.—Held, that this being so, there arises a strong presumption that plaintiff has a recourse against the defendants. The *onus* of proving *cas fortuit* or *force majeure* to dispel this presumption is on the defendants. *Joint* v. *Webster*, 15 Que. S.C. 220.

IX. Secondary Evidence.

—Written guarantee—Verbal evidence—Art. 1233 C.C.]—When a written contract is lost, and oral evidence is adduced as to its contents, this verbal testimony must always be interpreted, whenever doubtful, in favour of the party who, without his fault, is deprived of the advantage of inspection of the document itself. *Lapointe* v. *Samson*, 15 Que. S.C. 14.

—Secondary evidence—Reason of rule—Waiver.]—The rule of law that the evidence offered should be the best, and that secondary evidence can be received only when the impossibility of producing the best has been established, is enacted in the interest of the parties, and is not founded upon considerations of public policy, and the objection to such evidence may be considered to be waived by the party interested in opposing it, when it is not made at the time the evidence is offered. *Guerin* v. *Fox*, 15 Que. S.C. 199.

X. Sufficiency.

—Deed—Delivery—Retention by grantor—Presumption—Rebuttal.]—The fact that a deed, after it has been signed and sealed by the grantor, is retained in the latter's possession is not sufficient evidence that it was never so delivered as to take effect as a duly executed instrument. The evidence in favour of the due execution of such a deed is not rebutted by the facts that it comprised all the grantor's property, and that while it professed to dispose of such property immediately, the grantor retained the possession and enjoyment of it until his death. *Zwicker* v. *Zwicker*, 29 S.C.R. 527.

—British ship at foreign port—Merchants' Shipping Act—Distressed seaman—Recovery of expenses—Proof of ownership and payment.]—A certificate of the Assistant Secretary of the Board of Trade that expenses for the relief of a distressed seaman left in a foreign port were incurred and paid, under the provisions of The Merchants' Shipping Act, 1854, s. 213, is sufficient proof of payment under the Act, though the above section does not provide for a mode of proof by certificate. —Notwithstanding the provision in the Imperial Interpretation Act of 1889 that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, in proceedings under The Merchants' Shipping Act of 1854, proof of ownership of a ship may be made according to the mode provided in The Merchants' Shipping Act, 1894, by which the former Act is repealed.—Under the Act of 1894 a copy of the registry of a ship registered in Liverpool, certified by the Registrar-General of Shipping at London, is sufficient proof of ownership. *The Queen* v. *Sailing Ship "Troop" Co.*, 29 S.C.R. 662.

XI. Varying and Explaining Written Documents.

—Parent and child—Obligation to support—Transfer of right—Written agreement.]—At common law there is no legal obligation on the part of a parent to maintain his children; the duty is only a moral one. A father, after the death of his wife, agreed in writing with her mother that she should, at her sole expense, have the custody, maintenance and education of his children in consideration of his renouncing his rights thereto and of other considerations:—Held, that he could transfer his rights as a parent, and, in the absence of fraud, evidence of an oral promise by him before the execution of the agreement that he would pay for the maintenance of the children was inadmissible. *Wright* v. *McCabe*, 30 Ont. R. 390.

—Landlord and tenant—Overholding tenant—Use and occupation—Value—Evidence.]

See Landlord and Tenant, X.
" Criminal Law, VII.

EVOCATION.

See Practice and Procedure, XXIV.

EXCHEQUER COURT.

—Solicitor and client—Exchequer Court case—Agreement for compensation—Champerty—Costs—Taxation.]—See Costs, XX.

EXECUTIONS.

I. Issuing Executions.

—Domicile of defendant—Opposition—Art. 555 C.C.P. (old text).]—Judgment was obtained against defendant for the rent of an office in Montreal. A writ of execution *de bonis et de terris* was issued on said judgment addressed to the sheriff of the district of St. Hyacinthe, where defendant had his head office. The writ was sent to the sheriff, but before he had taken any steps towards executing it defendant filed an opposition alleging that it should have been addressed to the sheriff of the district of Montreal where, it was claimed, the record shewed that he possessed movable property. This opposition was dismissed by the Superior Court on the ground that the opposition was premature:—Held by the Court of Review, without pronouncing on the ground adopted by the Superior Court, that defendant having his head office at St. Hyacinthe his movable property is assumed to be there, and the writ of execution could be addressed in the first place to the sheriff of that district. *Montreal Board of Trade* v. *United Counties Ry. Co.*, 14 Que. S.C. 381.

— Costs — Practice — Execution after notice — Sheriff's poundage—Making order of Supreme Court a judgment of the Court below.]—A plaintiff is justified under Rule 683 of the Queen's Bench Act, 1895, in issuing executions and certificates of judgment immediately on judgment being entered, notwithstanding that defendant has given notice of appeal to the Supreme Court of Canada; and although, upon the perfecting of the security for the appeal, an order has been made setting aside the executions, the plaintiff is entitled, after dismissal of the appeal, to the costs of the executions and certificates. *Clarke* v. *Creighton*, 14 Ont. Pr. 34 followed. The order setting aside the executions having reserved the question of the sheriff's fees, but made no reference to poundage, such cannot be ordered afterwards in view of s. 48 of the Supreme Court Act, R.S.C. c. 135. *Day* v. *Rutledge*, 12 Man. R. 451.

II. Proceedings Under.

—Seizure and sale of equity of redemption in goods—Necessity of demand and refusal by sheriff—Custody of goods.]—By O. 40, R. 31, under an execution, the sheriff may seize and sell the interest or equity of redemption in any goods of the party against whom the execution is issued, and such sale shall convey whatever interest the mortgagor has in such

goods and chattels at the time of the delivery of the writ to the sheriff. The defendant sheriff sent his deputy to the premises of the judgment debtor, whose stock was covered by a bill of sale held by plaintiff, with instructions to levy for the amount over the bill of sale. The deputy merely went to the premises, and made a list of the articles, and notified the judgment debtor that he had levied, and the sheriff, without taking any further action, and without removing the goods, or putting anyone in charge, advertised for sale all the right and interest of the judgment debtor:—Held, that the sheriff had not exceeded his powers under the order, and that no action would lie against him by the holder of the bill of sale. Per Weatherbe, J. (Ritchie, J., concurring).:—Held, that, the sheriff would have been justified in putting someone in charge of the goods, pending the sale. *Quære*, having failed to do so, whether he would not have been personally liable in case of the removal of the goods. Per Meagher, J. (Henry, J., concurring):—Held, that a demand and refusal, or something that would be equivalent thereto, such as notice forbidding the sale and evidence of some act or conduct in disregard of such notice, would be necessary to render the sheriff liable as a wrong-doer as against the holder of the bill of sale. *McKay* v. *Harris*, 32 N.S.R. 150.

—Seizure by sheriff under—Landlord's claim for rent—Interpleader issue.]

See PRACTICE AND PROCEDURE, XXXIV.

III. SALE UNDER EXECUTION.

—Temporary seizure before judgment—Notice of sale—Art. 640 C.C.P.]—Where there has been a temporary seizure (*saisie provisionelle*) before judgment it is not necessary that the notice of sale required by Art. 640 C.C.P. to be given to the defendant and his guardian, should mention the amount ordered to be levied by the writ of execution. *Boyer* v. *Charbouneau*, 15 Que. S.C. 323.

IV. SEIZURE UNDER.

—Opposition—Procès-verbal of seizure—Art. 630 C.C.P.—Second seizure of same effects—Art. 623 C.C.P.]—*A procès-verbal* of seizure in which a large quantity of labels seized were merely described as "a lot of labels of different sorts" and also "six boxes of labels" is not in accordance with Art. 630 C.C.P., the defendants being entitled to have the effects more particularly described so as to be able to identify them subsequently. Where an opposition to seizure alleges among other grounds, that the effects seized had been already taken in execution and were in the possession of a guardian, and that the bailiff should have named the same guardian, the opposition cannot be considered frivolous on its face, and a motion to dismiss it as such will be rejected. *Pelletier* v. *Campbell*, 14 Que. S.C. 519.

—Guardian appointed to effects seized—Release from guardianship—Art. 1825 C.C.—Art. 657 C.C.P.]—The Court has no power to relieve the guardian of effects under seizure at his own instance, from his obligations as guardian, so long as the seizure under which he has been appointed remains in force; but it may, by consent of the seizing party, authorize his discharge on condition that the effects be produced and handed over free of charges to the new guardian to be named. *Archambault* v. *Tessier*, 15 Que. S.C. 230.

—Guardian to seizure—Suit for his wages as such—Procès-verbal—Evidence to contradict the same.]—When a *procès-verbal* declares that the guardian has been furnished by one party to the suit, it shall not be allowed to such guardian to contest such *procès-verbal* as erroneous on this point on a motion made at the *enquête*. It is too late, especially so, when the guardian was fully aware of this alleged error from the start. When the guardian has signed such *procès-verbal* himself, he cannot be allowed to contradict his own writing which forms his contract for wages with all concerned. The guardian given by the judgment debtor is not entitled to a salary. On this point, the new Code of Procedure has left the law as it was before. *Bouchard* v. *Dion*, 15 Que. S.C. 243.

—Fraudulent donation—Failure to register—Seizure as against donor—Opposition—Action paulienne—Arts. 804-6, 809 C.C.]

See DONATION.

V. VALIDITY.

—Seizure of immovable—Description—Art. 2168 C.C.—Art. 706 C.C.P.]—The description of land seized, as being part of a lot known and designated upon the plan and official register of the St. Lawrence Ward in the City of Montreal, under No. 516, bounded in front by the true line of Bleury Street, such land being the residue of said lot, No. 516, after taking away the part expropriated by the city for enlarging the street, is insufficient, as such part of the official lot should have been described by its metes and bounds, and the defendant, whose land so described has been seized and advertised for judicial sale, could on that ground demand that the seizure be annulled. *Royal Institution for the Advancement of Learning* v. *Guerin*, 15 Que. S.C. 344.

—Execution irregularly issued—Return.]—Where, on application to set aside a writ of execution, it appeared that a previous execution had been issued in the same matter, and that defendant had been arrested thereunder, but that no return had been made thereto:—Held, allowing defendant's appeal with costs, that the execution moved against was irregularly issued, and that there was clear ground for setting it aside. *Dunbar* v. *Ross*, 32 N.S.R. 222.

EXECUTORS AND ADMINISTRATORS.

I. Administration.

—Trustees and executors—Art. 9810 C.C.—Responsibility of trustee for investment of moneys.]—At the time of defendant's appointment as executor and trustee he received certain shares in a bank, which shares had been purchased by the testatrix and reserved by the executor and trustee who preceded defendant, for the purpose of an investment to secure the plaintiff interest which she was entitled to receive under the will. Art. 9810 C.C., under which trustees are bound to invest moneys held by them as administrators in certain securities, amongst which bank stock is not included, was in force at the time of defendant's appointment:—Held, that as defendant, when appointed, did not receive or hold any moneys for the benefit of the plaintiff, but merely shares of stock standing in the name of the executors, he was not bound under the circumstances to change the investment, and could not be held responsible for the loss occasioned by the insolvency of the bank. *Hill* v. *Campbell*, 15 Que. S.C. 125.

—Administration of estates—Man. Q.B. Act, 1895, R. 766—Discretion of Court.]—On an application by a legatee for an order under Rule 766 of the Man. Queen's Bench Act, 1895, for administration of a testator's estate, the Court has a discretion to grant or refuse the order, although more than a year has passed since the death of the testator; and, when the executors are doing their best to realize the assets and are in no default, the application should be refused. *Re O'Connor*, *O'Connor* v. *Fahey*, 12 Man. R. 325.

—Life insurance—Domicil of insured—Foreign and domestic administrator.]

See Insurance, III.

II. Appointment of Executors.

—Duration of a charge—Year and a day—Judicial power to extend—Art. 924 C.C.]—When a testator has appointed executors charged with duties, the performance of which would extend over several years, without, however, enlarging tenure of office *(saisine)* beyond a year and a day, neither the court nor a judge has power to continue the executors in office beyond the legal period. Their right to continue to exercise their functions depends on the interpretation of the will and such interpretation does not come within the attributes of the court or judge on a petition presented under Art. 924 C.C. *Drapeau* v. *St. Denis*, 15 Que. S.C. 179.

III. Distribution of Estate.

—Probate Court — Intestate estate.]—A. died intestate, leaving as heirs a sister and two nephews. Upon passing accounts of his estate a sum of $1,000 was found to be in the hands of his administrators, and was directed to be left there till final winding-up of the estate:—Held, that the payment of that amount or any part of it to defend a suit to set aside a trust deed of the sister after her death could not be allowed. *Re Anning*, 34 N.B.R. 308.

IV. Fund.

—Payment into court—Infant's money—Executor.]—See Infant, III.

V. Judicial Proceedings.

—Administrators—Action continued against—Devastavit—Action for—Stay—County Court—Record of judgment recovered in.]—Plaintiff brought an action against D. S. in the County Court. At the trial, the Trial Judge, being unable to arrive at a satisfactory conclusion, owing to the contradictory nature of the testimony, an order was made, by consent of both parties, that the cause should be continued until the term of the Court, to be held in August, 1888, and should then be tried with a jury. In April, 1888, D. S. died, and, in May following, defendants were granted administration of his estate. On the 3rd August, 1888, plaintiff obtained an *ex parte* order that the proceedings should be continued between the plaintiff and the administrators. This order was served but no appearance was entered. On August 24, 1888, plaintiff served the administrators with notice of motion for judgment, and, on the 28th August, defendants, the administrators, having failed to appear or offer any opposition, the Judge of the County Court granted an order directing judgment to be entered against defendants, as administrators of D. S., for the amount sued for with costs. Execution was issued on the 3rd of March, 1890, but was returned unsatisfied on the 21st of the same month, the administrators having in the meantime obtained a decree of insolvency from the Probate Court. Plaintiff thereupon brought action against the administrators in the Supreme Court, on the County Court judgment, alleging a *devastavit*, to which defendants pleaded "no assets." The learned Trial Judge, under the provisions of R.S. c. 100, s. 56, directed a stay of proceedings.—Held, that the defence pleaded by D.S., being outstanding at the time of his death, and the order providing for trial by jury remaining effective, plaintiff could only proceed with the trial of the issues in the manner in which they must have been tried if D. S. were still living, and that any other mode of trial, not consented to by the parties, was irregular and without jurisdiction.—Held, also, that the record of the judgment in the County Court was not conclusive, but could be examined for the purpose of determining, from an inspection thereof, whether the Court had jurisdiction to pronounce the judgment given in the cause, and that, on its face, such record was bad, and no proof of the judgment recovered.

—Held, also, that the cause of action being against the administrators for a *devastavit*, R.S. c. 100, s. 56, had no application, and the Trial Judge erred in granting a stay of proceedings under the provisions of that section. *Stewart* v. *Taylor*, 31 N.S.R. 503.

—Action for death from negligence—Widow and children — Letters of administration.] — The widow and child of a person killed in consequence of the defendant's negligence may, when letters of administration to his estate have not been issued, bring an action under R.S.O. c. 166, without waiting six months. *Curran* v. *Grand Trunk Ry. Co.*, 25 Ont. App. 407.

—Action against executor to recover part of legacy—Joinder of legatee to whom whole legacy paid.]—See PARTIES, II.

VI. REMOVAL.

—Insolvency of executor—Incapacity—Misconduct — Appointment of sequestrator.] — The insolvency of a testamentary executor is not of itself a cause for his removal, but the Court can and should take it into account in appreciating acts of incapacity and unfaithfulness, of dissipation and waste which are charged against the executor. — When the Court directs the removal of a testamentary executor it can order the instant appointment of a sequestrator to administer the succession. *Lespérance* v. *Gingras*, 15 Que. S.C. 462.

VII. RIGHTS AND LIABILITIES.

— Devise — Power to mortgage — Payment of debts — Trustee Act—Devolution of Estates Act.— The testatrix, after a direction to him to pay her debts, devised land to her executor and trustee, and his executors and administrators, upon trust to retain for his own use for life, and directed that after his decease his executors or administrators should sell the land and divide the proceeds among her children: —Held, that this was a devise of the farm out and out as to the legal estate—the words "and his executors and administrators" being equivalent to "heirs and assigns"; the executor had the right by virtue of s. 16 of the Trustee Act, R.S.O. c. 129, to mortgage the entire fee for debts; and the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by s. 19. *In re Bailey*, 12 Ch. D. 268, and *In re Tanqueray-Willaume and Landau*, 20 Ch. D. at p. 476, followed. The Devolution of Estates Act, R.S.O. c. 127, does not apply to a case where the executor derives his title to the land from, and acts under, the will and the provisions of the Trustee Act. *Mercer* v. *Neff*, 29 Ont. R. 680.

— Executors of surviving executor — Notice for claims — R.S.O. c. 129, s. 38 — Requisites — Administration de bonis non—Statute of Limitations.]—A notice by an executor or trustee given under s. 38, R.S.O. c. 129, "The Trustee Act," besides calling for claims against the estate, should state that the effect of non-compliance with it will be the exclusion of persons failing to comply therewith from participation in the estate to be divided, and such notice should be published in newspapers in localities where claimants on the estate reside, or in the *Ontario Gazette* if their residence is unknown. And where the executors of a sole surviving executor of an estate, in giving notice for claims under the statute, omitted to give the proper notice for claims against the estate of which their testator had been to their knowledge executor, with which they had never intermeddled and of the existence of claims against which they were unaware, they were held liable to *cestuis que trust*, to whose knowledge the existence of the notice was not shewn to have come, for a fund for which their testator was responsible; and the fact that administration *de bonis non* of the estate of which their testator had been executor was subsequently granted to another person did not under the circumstances of this case affect their liability. The claim of one of the *cestuis que trust* who was entitled to a life interest in, and who had received the income from the wrongful holder of part of the estate in question, was held barred by the Statute of Limitations as against the executors, she not having received anything from them for six years—liberty to retain the income of the portion to be made good by them being allowed to the executors, they being liable to certain other *cestuis que trust* having a reversionary interest in the fund, and whose claims were protected from the operation of the statute by s.s. (*b*) of s. 32 of the Act. *In re Somerset, Somerset* v. *Earl Poulett*, [1894] 1 Ch. 231, followed. *Stewart* v. *Snyder*, 30 Ont. R. 110.

—Fraud of solicitor—Negligence of executor—Agency of solicitor—Representations and payments by—Statute of Limitations.]—Executors relying upon the word of a solicitor who had managed the testator's affairs in his lifetime, procured from him a list of mortgages alleged to have been taken by the testator, representing a trust fund of $5,000 set apart by the will for the widow, but without the actual production of the mortgages, and shewed it to her, informing her that the solicitor would pay her the interest. As a matter of fact the mortgages never had any existence, but the solicitor regularly paid her the interest up to the time of his death: —Held, that the executors had neglected their duty in not setting aside the $5,000 in money or securities, and that their duty in that respect could not be delegated. Held, also, that they had appointed the solicitor their agent for the purpose of paying the interest, and that statements and payments made by him were made in the course of the business for which they had employed him; that each payment was a renewal of the representation that the $5,000 was still in their hands, invested for her benefit; and

they could not be allowed to set up the Statute of Limitation in answer to the plaintiff's claim, or that the statements they made were not true, and that they were liable to make the fund good. *Clark* v. *Bellamy*, 30 Ont. R. 532.

—Husband and wife—Separate estate—Rights of husband in—Rights of administrator of wife's estate.]—See HUSBAND AND WIFE, XII.

And see PROBATE COURT.

EXEMPTIONS.

See ASSESSMENT AND TAXES, VI.

EXPERTISE.

—Costs of expertise—Payment—Solidarité.]—The parties to an action are jointly and severally (*solidairement*) liable for payment of *experts*, without regard to the one who demanded the *expertise*, nor to the fact that it may have been ordered by the Court. This *solidarité* covers also the deposit required for the payment when such deposit is demanded by the *experts;* consequently, one party cannot relieve himself of his joint and several obligation by depositing in Court his share of the account of the *experts*. *Berlinguet* v. *Beaucage*, 15 Que. S.C. 563.

—Death of one expert—Duties of survivors and new experts.]—One of the three experts appointed in a case having died during the proceedings, and a new expert having been appointed, it is not necessary for the two surviving experts to be again put under oath. Such a proceeding would be unnecessary even under a new expertise, if the same parties were appointed to perform the same duties. When experts are appointed to examine and report upon the value of an immovable and upon the value of improvements made thereon, it is not necessary for such experts to report upon each improvement separately when all the improvements have been carried on and completed about the same time. It would be different if the contracts for improvements had been made at different times. The new expert who is appointed to replace one of the three first named, has not merely to read the evidence that has been already taken before the said experts, nor merely to consult the notes the former expert may have left, but has to hear the parties conjointly with the other experts and to do all those things which the Civil Code of procedure makes imperative for a valid expertise. In this case it being established that the new expert had simply given the court his appreciation of the evidence, the report is rejected as irregular. *City of Montreal* v. *Houston*, 5 Rev. de Jur. 473.

—Bornage—Appointment of surveyor—Deposit of fees.]—See BOUNDARY.

EXPERT EVIDENCE.

See EVIDENCE, IV.

EXPROPRIATION.

—Of Land.]

See CROWN.
" MUNICIPAL CORPORATIONS.
" PUBLIC WORK.
" RAILWAYS AND RAILWAY COMPANIES.

EXTRADITION.

See CRIMINAL LAW, VIII.

FAITS ET ARTICLES.

—Interrogatories—Husband séparé de biens—In cause only to authorize wife—Art. 359 C.C.P.]

See PRACTICE AND PROCEDURE, XXXV.

FENCES.

— Servitude — Divisional wall — Fence wall—Mitoyenneté—Art. 520 C.C.]—See SERVITUDE.

FINES AND PENALTIES.

— Conviction — Fine — Appropriation — Certiorari.]—A conviction condemning the offender to pay a fine should direct to whom it is to be paid. Therefore, a conviction imposing a fine to be paid and employed according to law is irregular and will be quashed on *certiorari*. *Provost* v. *Leclerc*, 14 Que. S.C. 208.

—Action for Penalty—Interrogatories sur faits et articles—Refusal to answer.]

See PRACTICE AND PROCEDURE, XXXV.

— Municipal tax—By-law—Infraction—Costs—Imprisonment—Discharge.]—See COSTS, VI.

FIRE.

—Damage from fire—Adjoining property.]

See NEGLIGENCE, IX.

FIXTURES.

—Mortgagor and mortgagee—Wooden building.]—A small building of thin board, lathed and plastered inside, and divided into three rooms, resting by its own weight on loose bricks laid on the soil, built for and used at first as a booth or shop and then for a time

as a dwelling house, was held to be a fixture in an action by the mortgagee of the land, although the building was placed on the land, after the mortgage was made, by the mortgagor's husband who swore that it was placed on the land without any intention of leaving it there permanently. *Miles* v. *Ankatell*, 25 Ont. App. 458, reversing 29 Ont. R. 21 and C.A. Dig. (1898) 194.

—Sale of—Severance—Intention—Rights of subsequent purchaser of freehold.]—*Minhinnick* v. *Jolly*, 26 Ont. App. 42, affirming 29 Ont. R. 238 and C.A. Dig. (1898) 194.

FORCE MAJEURE.

—Evidence—Presumption—Onus.]

See EVIDENCE, VIII.

—Accident—Personal injuries—Unusual fall of snow.]—See MUNICIPAL CORPORATIONS, XI.

FOREIGN CORPORATION.

—Writ of summons—Service on foreign corporation—Business within Ontario—Servant—Agent—Rule 159.]

See PRACTICE AND PROCEDURE, LIII.

FOREIGNER.

—Arrest of foreigner for debt.]

See DEBTOR AND CREDITOR, II.

FOREIGN GOVERNMENT.

See CONFLICT OF LAWS.

FOREIGN JUDGMENT.

—Foreign judgment for alimony—Suing on.]

See JUDGMENT, X.

FOREIGN LAW.

See CONFLICT OF LAWS.

FORESHORE.

—Accretion—Growing grass—Property in—Right of seigneur in foreshore—Arts. 558, 691 C.C.—6 W. 4, c. 55—C.S.L.C. c. 28—R.S.Q. Arts. 5537, 5541—61 V., c. 40 (P.Q.).]—The grass growing on the River St. Lawrence below low water mark belongs to the person first taking possession of it as a product of the sea—The *seigneurs* of the *seigneuries* along the St. Lawrence, below the City of Quebec, have not, as such, a right to the foreshore opposite their lands, that is, on the part covered, and then laid bare, by the waters; this foreshore is not an appurtenance to the seigniory; the *seigneur* owns it only if it has been given to him by an express grant, in which case the grant is effective and he becomes the owner of the foreshore subject to the public use of the waters of the river; and the foreshore having been granted it becomes a property separate and not appurtenant, so that if the *seigneur* conveys land bounded in front by the river the conveyance will not include the foreshore opposite such land but the same will remain the property of the *seigneur*; the grantee does not take it unless expressly conveyed.—When the foreshore is granted to the *seigneur* the latter as proprietor thereof is owner of all the grass growing thereon; and the law which assigns the grass to the riparian owners does not apply since, when such law was adopted, the foreshore was the private property of the *seigneur*.—In the original title of concession of the seigniority of *l'Isle Verte* which has two miles of frontage on the River St. Lawrence, the opposite foreshore is especially granted to the *seigneurs* by these words: "*Ensemble les battures, isles et islets qui se rencontrent vis-à-vis les dites deux lieues jusqu' à la dite Isle Verte.*" The title of the plaintiff in this case makes the river the front boundary of his land which is situated in said seigniory and therefore the land is considered to be bounded by high water mark and does not include the foreshore; the plaintiff has no title to the foreshore and no possession of it and cannot claim from defendant the grass which the latter cut and took away on the foreshore opposite plaintiff's land. *Dumas* v. *Mignault*, 15 Que. S. C. 276.

FORUM.

—Special forum—Rights of parties—Declaration of right—Jurisdiction.]

See PRACTICE AND PROCEDURE, XVII.

FRAUD.

—Partnership—Deed of dissolution—Fraud and simulation.]—See PARTNERSHIP, II.

FRAUDULENT CONVEYANCES.

See BANKRUPTCY AND INSOLVENCY.
" DEBTOR AND CREDITOR.
" STATUTE OF ELIZABETH.

FRIENDLY SOCIETY.

See INSURANCE, III.

FUTURE RIGHTS.

—Footway — Reconstruction — Art. 49 C.C.P.— Evocation.]

See PRACTICE AND PROCEDURE, XXIV.

GAMING.

—Cheque given for gambling debt—Holder in good faith.]—A third party, holder in good faith of a cheque given for a debt incurred at play, may recover the amount thereof at law. *Dion* v. *Lachance*, 14 Que. S.C. 77.

GARNISHEE.

—Saisie-arrêt—Seizure of share in partnership —Art. 698 C.C.P.—Declaration by garnishee.]—Where a seizure in garnishment is made of the share of the defendant in partnership the declaration of the garnishee, under Art. 698 C.C.P., must disclose the share of the defendant in the stock and profits of the partnership, even where the declaration of the garnishee denies all indebtedness to the defendant; and where the declaration of the garnishee fails to give such information, the Court on motion to reject the declaration, will order the garnishee to complete his declaration by setting forth the share of the defendant in the stock and profits of the partnership. *Leet* v. *Singer*, 15 Que. S.C. 142.

—Seizure of wages — Public officer — Art. 599 C.C.P.]—A city assessor is a "public officer" within the meaning of Art. 599 C.C.P., and his salary is not liable to seizure by garnishment. *Stewart* v. *Euard*, 15 Que. S.C. 262.

—Queen's Bench's Act (Man.), 1895, s. 39, s.s. 11 —Rule 742—Equitable execution.]—Where A. has sold and conveyed land to B. under an agreement that, if B. could at any time resell the property for a larger amount, he would account to A. for the excess, there is nothing upon which to base a garnishing order at the instance of a creditor of A., as there is neither any debt owing or accruing from the garnishee to the debtor, nor any claim or demand arising out of trust or contract which could be made available by equitable execution, nor would it be proper in such a case to appoint a receiver under s. 39, s.s. 11, of The Queen's Bench Act, 1895. The claims and demands referred to in Rule 742 of the Act, as re-enacted by 60 V., c. 4, are those that would be available by equitable execution at the suit of the judgment debtor himself, and not at the suit of the judgment creditor: *Central Bank* v. *Ellis*, 20 Ont. App. 364, followed. *McFadden* v. *Kerr*, 12 Man. R. 487.

And see PRACTICE AND PROCEDURE, XXVIII.

—Saisie-arrêt after judgment—Contestation— Non-indebtedness—Quashing writ—Costs.]

See PRACTICE AND PROCEDURE, IX.
" SAISIE-ARRET.

GAS COMPANY.

—Supply of gas—Several buildings of one owner —Default as to one—Stopping general supply.]

See STATUTE, II.

GENERAL AVERAGE.

See SHIPPING, VI.

GIFT.

— Gifts inter vivos — Acceptance — Movable — Possession — Presumption of title — Arts. 776, 2194, 2268 C.C.]

See DONATION.
" DONATIO MORTIS CAUSA.

GOODWILL.

—Company—Transfer of assets and goodwill— Trade name—Imitation—Injunction.]

See COMPANY, X.

GRAND JURY.

—Criminal law—Number of grand jurors summoned—Necessary majority.]

See CRIMINAL LAW, XVI.

—Crown case reserved—Grand jury panels— Criminal courts and procedure — Powers of Dominion and Provincial legislatures.]

See CRIMINAL LAW, XVI.

GRAND TRUNK RAILWAY.

—R.S.O. c. 246 — Sunday observance—Employee working on Sunday—Application.]

See SUNDAY.

GUARANTEE.

— Railway bonds — Guarantee of interest — Powers of Government.]

See RAILWAYS AND RAILWAY COMPANIES, VII.

GUARDIAN.

—Guardian appointed to effects seized—Release from guardianship—Art. 1835 C.C.—Art. 657 C.C.P.]—The Court has no power to relieve the guardians of effects under seizure at his own instance, from his obligations as guardian, so long as the seizure under which he has been appointed remains in force; but it may, by consent of the seizing party, authorize his discharge on condition that the effects be produced and handed over free of charges to the new guardian to be named. *Archambault* v. *Tessier*, 15 Que. S.C. 230.

—Guardian to seizure—Suit for his wages as such—Procès-verbal—Evidence to contradict the same.]—When a *procès-verbal* declares that the guardian has been furnished by one party to the suit, it shall not be allowed to such guardian to contest such *procès-verbal* as erroneous on this point on a motion made at the *enquête*. It is too late, especially so, when the guardian was fully aware of this alleged error from the start. When the guardian has signed such *procès-verbal* himself, he cannot be allowed to contradict his own writing which forms his contract for wages with all concerned. The guardian given by the judgment debtor is not entitled to a salary On this point, the new Code of Procedure has left the law as it was before. *Bouchard* v. *Dion*, 15 Que. S.C. 243.

—Opposition—Appointment of Guardian—Art. 621 C.C.P.]—Where a bailiff seizes movable property as belonging to the defendant, and fails to appoint a guardian to the goods so seized, the opposant who claims the property has a right to petition the Court for the appointment of a guardian to the same, and the bailiff is bound to accept such guardian, if the latter can comply with the requirements of Art. 621 C.C.P. *Genser* v. *Schwartz*, 2 Que. P.R. 29.

—Money in Court—Infants—Payment out—Surrogate guardian.]—See INFANT, III.

—Guardian of thing seized in revendication—Custody under writ of execution—Responsibility.]

See REVENDICATION.

HABEAS CORPUS.

—Issue by Judge of High Court—Non-appeal from judgment—Res Judicata.]—A person confined or restrained of his liberty is now limited to only one writ of habeas corpus to be granted by a Judge of the High Court, returnable before himself or before a Judge in Chambers, or before a Divisional Court, with a right of appeal to the Court of Appeal, whose judgment is final; and where no such appeal is taken, the judgment which might have been appealed against becomes final and conclusive, and may be pleaded as *res judicata*. *Taylor* v. *Scott*, 30 Ont. R. 475.

—Costs in habeas corpus proceedings.]—Per Drake, J. The Court has power under the B.C. Supreme Court Act, s. 10, and Rule 751, to award costs upon a rule nisi for *habeas corpus*. *Re Quai Shing*, 6 B.C.R. 86.

See PRACTICE AND PROCEDURE, XXIX.

—Ice—Water and watercourses—Constitutional law—Public harbour.]—The plaintiff was the owner of a lot bounded by the water's edge of Lake Simcoe, and also of the adjoining lot covered by the waters of that lake, there not being in the patent of either lot any special reservation of right of access to the shore:—Held, that he was entitled to the ice which formed upon the water lot and had the right to cut and make use of it for his profit; that no other person was entitled to cut and remove the ice except in the *bonâ fide* and advantageous exercise of the public easement of navigation; and that the defendants were not exercising that easement when they cut channels through the plaintiff's ice in which to float to the shore blocks of ice cut by them beyond the limits of plaintiff's water lot. Held, also, Osler, J. A., expressing no opinion, that the *locus in quo*, a small bay in Lake Simcoe, at which there was a wharf where, with the permission of the owner, vessels used to call, but no mooring ground and little shelter except from wind off the land, was not a public harbour within the meaning of the British North America Act, and the plaintiff's grant from the province was valid. *McDonald* v. *Lake Simcoe Ice and Cold Storage Company*, 26 Ont. App. 411, reversing 29 Ont. R. 247, and C. A. Dig. (1898) 309.

HARBOUR COMMISSION.

—Mandamus—Prohibition—Pilotage and pilotage dues—Compulsory pilotage.]—If the information and complaint presented to a secretary of a Harbour Commission or other similar corporation or board, does not disclose a properly described offence which the Commissioners have the right to try, the secretary is not bound to act upon it. If he does, he is exposed to a writ of prohibition.—When the complaint and information is defective in an essential particular, a mandamus will not lie to compel the secretary of the Commission to receive it or act upon it.—Pilotage itself is nowhere compulsory in Canada; what is compulsory is the payment of pilotage dues in certain cases even if a pilot be not used. *Lamarre* v. *Woods*, 14 Que. S.C. 1.

HEIRS.

—Succession—Disposal of rights—Dower.]—A child assumes the quality of heir to his father by disposing of his rights in the succession, and therefore has afterwards no claim to dower. *Perrier* v. *Palin*, 14 Que. S.C. 332.

—International law — Succession to lands in Quebec—Lex loci.]—The rights and liabilities of alleged heirs in relation to immovables situate in Quebec are governed by the law of Quebec. *Page* v. *McLennan*, 14 Que. S.C. 392.

HIGHWAYS.

See Municipal Corporations, XI.

HORSE RACING.

—Provincial exhibition — Speed competition — Bonâ fide owner—"Hack horse."]—At the N. S. Provincial Exhibition, 1897, prizes were offered for a number of so-called "speed contests," including one open to "all licensed hackmen." By the rules entries were required to be made in the name of the *bonâ fide* owner for three months previously, and, in the event of failure to observe the rule, it was provided that no premium would be awarded, or, if awarded, would be withheld. Plaintiff entered a horse of which he had not been the *bonâ fide* owner for the required time before making the entry, and which was not a *bonâ fide* hack horse, inasmuch as it was not a horse used in the ordinary course of the hack business, although it had been driven several times in cabs and other vehicles.—Held, that plaintiff having entered his horse, and allowed it to run, subject to the decision of the judges, and having failed to fulfil the conditions upon which defendants agreed to pay the amount of the prize money, could not recover the amount claimed.—Held, also, that a thorough bred horse, *bonâ fide* used by a hackman in the ordinary course of his business, comes within the meaning of the words "hack horse." *Robinson* v. *Provincial Exhibition Commission*, 32 N.S.R. 216.

HOTELKEEPER.

See Lien, II.

HUSBAND AND WIFE.

I. Advancement to Wife.

— Purchase in wife's name — Presumption—Rebuttal.]—A purchase by a husband in the name of his wife is presumed to be an advancement to the wife, and the presumption will not be rebutted by the fact of the husband devising the property by will. *Leonard* v. *Leonard*, 1 N.B. Eq. 576.

II. Agency.

—Proceeds of sale of land—Verbal assignment by wife of owner—Subsequent written assignment—Priority on fund.]—A married woman, as agent of her husband who was indebted for costs to a firm of solicitors instructed one of the firm, after its dissolution, to sell certain land and retain the costs out of the proceeds as a first charge. The land was sold by a new firm, in which one of the old firm was a member:—Held, that the wife's instructions amounted to an equitable assignment, and that the solicitors were entitled to the proceeds of the sale as against an assignee under a written assignment of the same, subsequently made:—Held, also, that the transaction was not a contract concerning land, but an agreement to apply the proceeds of land when sold. Judgment of the County Court of the county of York reversed. *Heyd* v. *Millar*, 29 Ont. R. 735.

III. Ante-Nuptial Contract.

—Contract charging lands—Registry of copy—Defective registration—Subsequent mortgage—Priority—Notice—57 V., c. 20, s. 69 (N.B.).]

See Registry Laws.

IV. Community.

—Immovable of community—Sale after dissolution—Opposition—Nullity of decree.]—When an immovable of the community hypothecated by the consorts, is sold in an action by the hypothecary creditor against the husband after the community has been dissolved without the heirs of the wife having been *mis en cause*, the latter who did not make opposition to the sale cannot demand that the decree be annulled. *Perrault* v. *Mousseau*, 6 Que. Q.B. 474, C.A. Dig. (1897), col. 343, followed. *Boivin* v. *Montreal Loan and Mortgage Co.*, 8 Que. Q.B. 456.

—Action by husband and wife—Inscription in law—Costs.]—An action for bodily injuries inflicted to wife assumed to be common as to property, belongs to the community, and therefore must be brought by the husband alone. *Tondreau* v. *Semple*, 2 Que. P.R. 296.

V. Contracts of Married Women.

—Hypothecary deed—Declaration of wife—Estoppel—Notary's deed—Declaration—Presumption.]—The declaration of a wife in an hypothecary deed (*acte d'hypothèque*) that a house had been built for her, and she was to pay for it, does not prevent her from pleading, in an action demanding the nullity of the hypothec as agreed to for the husband in contravention of Art. 1301 C.C., that the house had been built for her husband, who was to pay for it.—The statement of the notary in a formal deed (*acte authentique*) that one of the parties had declared this fact to him, only involves the good faith of the notary's statement, and not the truth or sincerity of the declaration, which could always be met by proof to the contrary without *inscription de faux*.—In this case a violent presumption against the sincerity of the wife's declaration results from the fact that she was obliged to pay the cost of construction on condition that the land upon which the house was built, the title of which was in her husband, should become her property, and that the husband had given the land to his mother-in-law, who, on the following day, made a donation of it to her daughter, which deeds had been subsequently annulled as constituting a donation between husband and wife. *Cossette* v. *Vinet*, 7 Que. Q.B. 512.

—Obligation of wife—Debt of community—Obligation after dissolution—Arts. 1301, 1369, 1370, 1371 C.C.]—The wife, after a judicial dissolution of the community, cannot become liable for a debt of the community, notwithstanding she may have accepted it, any such obligation being really incurred on behalf of her husband, who is liable to the creditors for the full payment of such a debt for which the wife is liable only for her proportion, and that only up to the amount of her benefit therefrom. *Bastien* v. *Filiatrault*, 15 Que. S.C. 445.

VI. Dealings Between Husband and Wife.

—Fraudulent bill of sale.]

See Bills of Sale and Chattel Mortgages, VII.

—Husband working for wife—Wages—Saisie-arrêt.]—See Debtor and Creditor, V.

—Insurance of husband's life by wife—Ratification.]—See Insurance, III.

VII. Lawful Marriage.

—Consanguinity—Dispensation—Second Marriage—Marriage contract—Community.]—The defendant and the *intervenante*, Roman Catholics and relations in the fourth degree of consanguinity, had on Feb. 4th, 1896, contracted marriage without dispensation from the ecclesiastical authorities and without a marriage contract. On Feb. 22nd, 1896, for the reason that this marriage was void because of the ties of relationship between them, they contracted marriage anew preceded on this occasion by a marriage contract providing for separation as to property (*séparation de biens*) plaintiff having made seizure of revenues held by the *intervenante* from her father's succession alleging that the defendant and *intervenante* had been married under the *regime* of community of property, the *intervenante* filed an intervention asking that the marriage of Feb. 4th be declared void, and that it be also declared that the property she held from the succession of her father could not be charged with liability to pay her husband's debts:—Held, that the marriage of Feb. 4th, 1896, not having been duly annuled and set aside by a decree of the ecclesiastical authority confirmed by the judgment of a Civil Court, was the only marriage existing between the parties, and that the marriage of Feb. 22nd was a nullity: therefore the parties were in community of property; Held, also, that even if the first marriage had been void it could not be set aside by an incidental proceeding such as that in the present case, and without the defendant being regularly made a party (*mis en cause*). *Cross* v. *Prévost*, 15 Que. S.C. 184.

VIII. Maintenance of Family.

—Obligation of wife to contribute towards expenses of family—Arts. 165, 1317, 1423 C.C.—Prescription.]—The obligation of the wife separated as to property from her husband, to contribute to the maintenance of the family (Arts. 165, 1317, 1423 C.C.) is not joint and several with the husband, and a judgment obtained against the husband for professional services rendered to the family does not interrupt prescription as regards the wife. *Piché* v. *Morse*, 15 Que. S.C. 306.

IX. Marchande Publique.

—Liability of husband when community of property exists—Procedure—Right of husband to plead—Arts. 179, 183, 1296, 1297, 1298 C.C.]—The husband when made a party to a suit to authorize his wife, may defend the action against the latter by a plea to the merits and there is no necessity for him to adopt any proceeding to have himself declared a party in the cause for that purpose.—A judgment rendered against the wife doing business as *marchande publique* and in community of property with her husband, binds the community of which the husband is head and master as well as half proprietor.—A wife cannot be a *marchande publique* without the real or implied authorization of her husband (Art. 179 C.C.), but such presumed authorization will result from a knowledge on the husband's part that his wife was so acting, and his continued silence in reference thereto.—When a wife, common as to property with her husband, carries on business as *marchande publique*, with the presumed

authorization of her husband, her acts bind the community of property of which the husband is the master. *Shorey* v. *Radford*, 5 Rev. de Jur. 42.

X. Matrimonial Rights.

—Domicile—Separation of property—Damages for illegal seizure.]—The defendant had seized against the plaintiff's husband, property which she claimed as being her own in an opposition. She was described in this opposition as being separated as to property from her said husband. The opposition was not contested, except as to the costs thereof, inasmuch as the defendant had acted in good faith when seizing the property as belonging to her husband. Her opposition having been maintained, she now claimed damages for the alleged illegal seizure:—Held, that the matrimonial rights of the consorts are governed by the domicile, not by the mere residence of the husband at the date of the marriage. The original domicile of the husband therefore is not lost by mere residence abroad.—In this case, the plaintiff's husband merely resided in New Hampshire when they married, and consequently they now were in community of property. She therefore could not bring this action in her own name. *Brien dit Desrochers* v. *Marchildon*, 15 Que. S.C. 318.

—Édit des secondes noces—Statutes of 1801—Testamentary powers—Arts. 831, 1467 C.C.—Dower.]—The Statute of 1801, 41 Geo. III., c. 4, now embodied in Art. 831 C.C., which gave absolute freedom in the disposal of property by will, abrogated the provison of the *Edit des secondes noces* prohibiting a widow from allowing a second or subsequent husband to participate in what she acquired by the gifts and liberalities of the first husband, to the prejudice of the children by the first marriage. *Perrier* v. *Palin*, 14 Que. S.C. 332.

XI. Proceedings by and against Married Women.

—Interdit—Habitual drunkenness—Wife curatrix—Demand of abandonment.]—B., a trader, was interdicted for habitual drunkenness and his wife appointed his curator. B., failing to meet his obligations, a demand of abandonment (*cession de biens*) was made on his wife in her representative character:—Held, that the demand was sufficient; that it was not necessary for B. to be summoned to give authority to his wife as the latter was not personally in the cause but only in her capacity as curatrix. *Renaud* v. *Hoffman*, 14 Que. S.C. 472.

—Action by wife separate as to property—Authorization of husband—Amendment of writ.]—A wife separate as to property cannot bring an action of damages for bodily injuries without her husband or his authorization; and where an action has been brought without the authorization of the husband, a motion by the wife for leave to amend the writ by inserting the name of the husband to authorize her, is illegal and cannot be granted. *McDonald* v. *Vineburg*, 15 Que. S. C. 267.

—Damages—Married woman—Authorization—Arts. 176, 183, C.C.]—A wife cannot appear in judicial proceedings without her husband, or his authorization, even if she be a public trader or not common as to property. As soon as it appears to the Court that she is acting without such authorization, or leave of the Court, all proceedings in the case will be annulled and the parties put out of Court. A married woman has a right, being thereto authorized by her husband, or on his refusal by the Court or Judge, to sue in her own name to vindicate her honour and to claim pecuniary compensation for damages for personal wrongs, such as slander and assault. *Néron* v. *Breton*, 15 Que. S.C. 339.

—Authorization of wife to ester en justice—Saisie-arrêt after judgment.]—Where a wife has been authorized by a judge to *ester en justice*, such authorization has effect only until final judgment, and a *saisie-arrêt* issued subsequently is therefore unauthorized and illegal. *Emory* v. *Martel*, 15 Que. S.C. 622.

—Separation as to bed and board—Dismissal—Authorization—Attachment—Motion to reject.]—A wife whose action in separation as to bed and board has been rejected, cannot, without another authorization of the Court, take any other proceedings against her husband, and a *saisie-arrêt* issued without the authorization of the Court will be dismissed on motion to that effect by the husband, defendant. *Emery* v. *Martel*, 2 Que. P.R. 264.

—Wife separated as to property—Action on promissory note—Authorization—Exception à la forme—Art. 176 C.C.]

See Practice and Procedure, XXV.

—Replevin action—Husband proceeding against wife in.]—See Replevin.

XII. Separate Estate and Business.

—Husband's interest—Renunciation—Rights of administrator of wife's estate—Evidence of Renunciation—Construction of Document.]—A husband is beneficially entitled to a share in the personal property of his wife, on her decease, because of his marital relationship and right; and in the same way to a share in her land, by virtue of R.S.O. c. 127, s. 5. If he renounces this marital right before marriage and in order to it, the law cannot replace him in the benefit out of which he has contracted himself. And where the husband has so renounced, he is not entitled to administration of his wife's estate, for administration follows interest. The administrator of the wife's estate has a status to set up the

husband's renunciation in answer to a claim made by him to a share in the estate. The husband, before marriage, signed a writing as follows:—"This is to certify that I, H. D., through marriage to A. E. T., will not assert any right or claim to the property of the said A. E. T., either real estate, cash in bank, household or personal effects:"—Held, that this was to be read as an abandonment of any right or claim in the property which might accrue to him through his intended marriage and was sufficient to protect her estate from any claim of his, after the separate use of the property, to which she was entitled under the Married Woman's Act in force at the date of the marriage, 1894, ceased by her death in 1896. *Dorsey* v. *Dorsey*, 30 Ont. R. 183.

—Séparation de biens—Interrogatories—Art. 359 C.C.P.]—The husband separated as to property (*separé de biens*), who is in the cause only to authorize his wife, cannot be interrogated *sur faits et articles*. *Price* v. *Marcotte*, 14 Que. S.C. 146.

—Obligation of wife—Household expenses—Education of children—Arts. 1317, 1423 C.C.]—The obligation of a wife separated as to property to contribute, according to her own and her husband's means, as well to the household expenses as to those of the education of their children, and to entirely support such expenses if her husband has no means (Art. 1317 C.C.) is not a joint and several obligation with the husband; therefore, she is not liable for interest and cost of a judgment obtained on a debt of this kind against her husband. *Piché* v. *Morse*, 14 Que. S.C. 165.

—Wife separate as to property—Witness—Art. 314, No. 4, C.C.P.]—By virtue of Art. 314, No. 4, of the new Code of Procedure, a wife separated as to property (*séparée de biens*) may be heard as a witness in favour of her husband as to the general administration of the property of the latter, but not as to a special matter. *Coote* v. *Bellingsley*, 14 Que. S.C. 271.

—Commerçant—Declaration—Registry—Penalty—60 V., c. 49, s. 13 (P.Q.)—Art. 5502a, R.S.Q.]—The declaration by a wife separated as to property, who wishes to engage in business, required by Art. 5502*a*, R.S.Q. (added to Art. 5502 by 60 V., c. 49, s. 13) to be sent to the registrar of the district and registrar of the county in which the business is to be carried on, will not free her from obligation to the penalty imposed by said article, if she only sends it to the registrar, and later, discovering her error, files it with the prothonotary, before the institution of the action for the penalty. *Fraser* v. *Marquis*, 15 Que. S.C. 50.

—Séparés de biens—Joint demand—Defamation—Jurisdiction of court—Art. 54 C.C.P.]—Where a husband and wife separated as to property (*séparés de biens*) jointly sued for damages for defamation in the Superior Court claiming $100 the Court held that it was in reality a demand for $50 by each plaintiff, and so within the exclusive jurisdiction of the Circuit Court to which the case was remitted. *Campbell* v. *Kavanagh*, 15 Que. S.C. 80.

—Separée de biens—Services of physician—Liability of wife.]—In the absence of an agreement therefor the wife separated as to property is not liable to a physician for services rendered to the family when in his books the physician had charged the husband alone for such services. *Pontbriand* v. *Mazurette*, 5 Rev. de Jur. 125.

—Married Woman's Property Act, 1884, s. 9—Use of wife's furniture in household—Reception of personal property by husband.]—The use in the household of furniture belonging to a woman married since 1884, is not a reception by the husband of personal property of the wife in connection with, or as a result of the marriage, within the terms of the Married Woman's Property Act, 1884, s. 9. *Bennett* v. *Lawrence*, 31 N.S.R. 289.

—Promissory note—Wife séparée de biens, maker—Indorsement by husband—Defence—Art. 1932 C.C.]

See BILLS OF EXCHANGE AND PROMISSORY NOTES, III.

—Husband and wife—Joint note—Validity—Separate estate—Foreign law.]

See PRACTICE AND PROCEDURE, XXXVIII.

—Wife separée de biens—Judgment against husband—Seizure—Opposition by wife—Ownership of effects seized.]

See PRACTICE AND PROCEDURE, XLIII.

XIII. SÉPARATION DE CORPS.

—Action for separation—Alleged reconciliation—Examination of wife.]—The husband, in an action by his wife for *séparation de corps*, cannot be permitted, in answer to a petition by the wife asking that he be restrained from seeking and annoying her, to allege that there has been a reconciliation between them, and to examine his wife as to the fact of such reconciliation. *Loiselle* v. *Parent*, 14 Que. S.C. 164.

—Examination of consort as witness—Art. 314 C.C.P.]—Where husband and wife are separated as to property, and one of the consorts has, as agent, administered property belonging to the other, the consort who has so administered may be examined as a witness in behalf of the other in relation to any fact connected with such administration, provided the Court be of opinion, in view of the circumstances of the case, that it is just and advisable to order such examination. *Lunn* v. *Houliston*, 14 Que. S.C. 289.

—Separation from bed and board—Rights of wife under marriage contract—Art. 208 C.C.]—

In an action against the wife for separation from bed and board, where adultery is not alleged, the plaintiff is not entitled to ask for the forfeiture of the advantages conferred on the wife by the marriage contract. *Champagne* v. *Swail*, 15 Que. S.C. 349.

—Action for separation—Defence.]—To an action by the husband for a *séparation de corps*, the defendant cannot plead facts shewing that she herself has a right to a *séparation de corps* from him. *Privé* v. *Bradley*, 5 R.L.N.S. 229.

XIV. Separation Deed.

—Dower—Trustees—Covenant as to release of dower—Construction of.]—In 1868 the plaintiff and her husband and trustees on her behalf executed a deed which contained an agreement for separation of the husband and wife, the conveyance of certain property by the husband for the benefit of the wife, and a number of covenants, one of which was as follows:—"And the parties of the third part" (the trustees) "hereby covenant that the said Jane Eves" (the plaintiff) "will, whenever called upon, release her dower in any lands of which he, the said James Eves" (the husband) "may hereinafter (*sic*) acquire a title." The other covenants were expressed to be with the heirs, executors and administrators of the husband. In an action by the plaintiff against the executrix of her husband's will, for dower in his after-acquired lands:—Held, that this covenant was a part of the consideration for the benefits the plaintiff received under the deed, and which she had ever since continued to enjoy, and, although she did not personally covenant, yet, as the covenant was entered into by her trustees on her behalf, and she was a party to and executed the deed containing it, she was bound by her recognition of and assent to it, and it would be contrary to equity to permit her to maintain the action. *Eves* v. *Booth*, 30 Ont. R. 689.

XV. Support of Wife.

—Failure to provide necessaries—Criminal Code, s. 210, s.s. 2.]

See Criminal Law, VII. (*d*).

And see Alimony.

Marriage Settlement.

HYPOTHEC.

—Insolvency—Registration.]—Since the coming into force of the Civil Code, an hypothec cannot be acquired without registration, and cannot be acquired on the property of persons notoriously insolvent at the time the registration is made. *Théberge* v. *Morency*, 14 Que. S.C. 84.

And see Mortgage, XV.

IMMOVABLE.

—Seizure of immovable—Description—Nullity.]

See Execution, V.

—Emancipated minor—Action immobilière—Sale of immovable—Recovery of price—Operation of law—Arts. 320, 382, C.C.]—See Infant, I.

—Immovables by destination—Locomotives and cars—Railway system—Situation of railway—Lex loci—Saisie mobilière.]—

See Conflict of Laws.

IMPRISONMENT.

—Contract by prisoner—Intimidation—Nullity.]

See Contract, VII.

IMPROVEMENTS.

—Landlord and tenant—Covenant for renewal—Compensation for improvements—Time for election.]—See Landlord and Tenant, II.

INFANT.

I. Capacity.

—Emancipated minor—Action immobilière—Recovery of price of sale—Arts. 320, 382 C.C.]—A minor emancipated by marriage being able, with the aid of his curator, to bring an action in regard to immovables (*action immobilière*) can, with such aid and without it being necessary to obtain judicial authority, on consent of the family council, recover the price of sale of one of his immovables sold during his minority and payable on his marriage, which price constitutes a *capital immobilier* by operation of law. *Bolduc* v. *Caillé* 14 Que. S.C. 209.

—Personal action—Exception à la forme.]—A minor cannot bring an action except by the aid of his tutor, and an action against a minor personally will be dismissed on exception to the form. *Beaudet* v. *Bédard*, 14 Que. S.C. 522.

—Personal action—Exception à la forme.]—An action by a minor who is not represented by a tutor is a nullity and will be dismissed on exception to the form. *Campetti* v. *Mayer*, 15 Que. S.C. 198.

—**Mineur emancipé — Action — Curator — Arts. 319, 320, 322 C.C.**]—A minor enjoying the revenues of his estate (*emancipé*) has no right, without the aid of his curator, to bring an action to recover the principal amount of an obligation. *Casgrain* v. *Malette*, 15 Que. S.C. 612.

—**Acceptance of succession—Benefit of inventory.**]—See SUCCESSION.

II. CONTRACTS.

—**Tutor—Promissory note signed by—Effect as regards minors.**]—On a promissory note signed by the promissor as tutor to minors, an action will not lie against a child who had attained the age of majority before the note was made. A tutor to minors has no power to create an obligation binding on them, by the mere acknowledgment of an indebtedness on their part made by him, nor by the promise made by him to pay the amount of such indebtedness. Therefore a promissory note signed by a person as tutor to minors creates no right of action in favour of the holder against the tutor in his capacity as such. *Nash* v. *Jodoin*, 15 Que. S.C. 70.

III. ESTATE.

—**Payment into court — Infants' moneys—Executor.**]—Where infants are entitled to maintenance out of a fund in the hands of the executor of their father's will, against whose character or solvency there is no imputation, it is nevertheless their right to have the fund brought into Court. *Re Humphries*, *Mortimer* v. *Humphries*, 18 Ont. Pr. 289.

—**Money in court—Infants—Payment out—Surrogate guardian.**]—Money paid into Court to the credit of infants will not be paid out to their guardian appointed by a Surrogate Court, upon his application, as a matter of right; though, in a proper case, an allowance for their maintenance and education may be made to him out of such moneys: *Re J. T. Smith's Trusts*, 18 Ont. R. 327 followed. *Huggins* v. *Law*, 14 Ont. App. 383, and *Hanrahan* v. *Hanrahan*, 18 Ont. R. 396, distinguished. *Re Harrison*, 18 Ont. Pr. 303.

—**Recovery of money due succession — General tutor—Personal action.**]—See ACTION, V.

IV. INJURY TO INFANT.

—**Workmen's compensation for Injuries Act—Defect in plant—Mother's services and expenditure.**]—The infant plaintiff, who was employed in a canning factory, was injured by the explosion of a retort or boiler in which vegetables were being cooked. The cooking was done by steam which was forced through the boiler, there being an intake pipe and an escape pipe which had to be adjusted by hand and no safety valve or automatic escape pipe. There was no evidence of the cause of the explosion and the defendants contended that it was due to a latent defect in the boiler:—Held, that it might properly be inferred that the explosion was caused either by the negligence of the person whose duty it was to adjust the escape pipe, or by the absence of the safety valve, and that in either view the defendants were liable. Judgment of Rose, J., affirmed. Held, also, that the mother of the infant could not recover for her services in attending upon him during his illness and for moneys expended and liabilities incurred by her for medical attendance, nursing and supplies, she not being in the legal relationship of master to him or under legal liability to maintain him. Judgment of Rose, J., reversed. *Wilson* v. *Boulter*, 26 Ont. App. 184.

V. MAINTENANCE.

—**Contingent interest — Life insurance.**]—An order was made for payment, out of a fund in Court to which an infant was contingently entitled, of an allowance for his maintenance, upon security being given by way of life insurance for the benefit of those who would be entitled upon the death of the infant under full age. *Re Arbuckle*, 14 W.R. 585, followed. *Re Campbell*, 18 Ont. Pr. 400.

—**Will—Construction—Gift of income to trustees.**]—A testator by his will gave his estate to trustees in trust to pay over the net income to the support, maintenance and education of the children of his son until the youngest should attain the age of twenty-one years. Some of the children were of age and the others were minors. The father was able to support, maintain and educate the children:—Held, that so much of the income as would be necessary should be paid to the father while he was under an obligation to support, maintain and educate the children, and did so, until the youngest child became of age. *Schofield* v. *Vassie*, 1 N.B. Eq. 637.

VI. OBLIGATION AS HEIRS.

—**Acceptance of succession—Filiation—Proof.**]—It is not necessary, in an action against minor children of a deceased debtor in their capacity of the latter's heirs, to allege acceptance by their tutor of the debtor's succession, but defendants, if they wish to free themselves from the obligation devolving upon them as heirs, should shew that they have renounced the succession.—If, in an action alleging that defendants are legitimate children of the debtor and therefore his heirs, the descent (filiation) of the children is not specifically denied the plaintiff is not obliged to prove it. *Royal Institution for the Advancement of Learning* v. *Picard*, 14 Que. S.C. 281.

VII. RATIFICATION OF CONTRACT.

—**Interpretation of deeds—Stipulations in deed of sale—Rights of mortgagees.**]—A stipulation in a deed of sale, by a father to his son,

whereby the latter was obliged to maintain his sister, so long as she remained unmarried, on condition that she should render household service, to the best of her ability, is not a *don* to his daughter, but the creation of a reciprocal obligation.—Such reciprocal obligation, having been made by the father during the minority of his daughter, required her acceptance when she reached the age of majority.—The daughter, having declined to acquiesce in such arrangement, and having refused to live with her brother for several years, until the filing of the present opposition, which is her only act of acceptance, cannot now claim a priority of hypothec on the property mortgaged for her said maintenance, over a subsequent mortgagee, who had duly registered his hypothec anterior to the filing of the opposition. *Birmingham* v. *Brabant*, 5 Rev. de Jur. 169.

VIII. Responsibility.

—Délit—Admissions—Arts. 986, 1007 C.C.]—A minor is not bound by admissions he may have made of a *délit* or *quasi-délit* committed by him and such admissions cannot be invoked against him. *Lecuyer* v. *Felix*, 2 Que. P.R. 176.

IX. Sale to Infant.

—Gift—Acceptance.]—Land may be sold to an infant as a gift, but to make him owner of the property there must be a lawful acceptance by him or on his behalf. *Turgeon* v. *Guay*, 15 Que. S.C. 332.

See Parent and Child.

INJUNCTION.

—Letters—Stenographic notes of—Property in—Stenographer—Implied contract—Breach—Publication—Public interest.]—Documents consisting of notes or drafts of private letters dictated by a member of a firm of solicitors to a stenographer in the course of business in the office were surreptitiously taken by him and given to another person, who, knowing how they had been obtained, proposed to publish them and to use them as evidence in a criminal prosecution or parliamentary inquiry he alleged he intended to bring about, although they contained nothing which could have been used as evidence against anyone. —Held, that the property in the documents was in the plaintiffs, and their possession having been obtained by a breach of contract, the plaintiffs were entitled to a perpetual injunction restraining their publication. *Laidlaw* v. *Lear*, 30 Ont. R. 26.

—Petition for interlocutory injunction—Service on opposite party—Summons.]—Where an interlocutory injunction is sought to be issued at the same time as the writ of summons in a cause, it must be asked for by petition, and such petition must be notified to the opposite party and adjudicated upon before the issue and service of the writ of summons in the cause; and where the interlocutory injunction is granted, it must be served at the same time as the writ of summons. The defendant is without right to complain that he was not summoned to answer the petition by means of a writ of summons. *Hart* v. *Rainville*, 15 Que. S.C. 17.

—Cutting trees—Irreparable injury—Art. 957 C.C.P.]—The cutting of trees on land by a trespasser alleging adverse title is irreparable injury within the meaning of Art. 957 of the Code of Procedure, and an interlocutory injunction may be issued in a possessory action to restrain the party doing the injury from the continuance of the act. *McDougall* v. *Grignon*, 15 Que. S.C. 535.

—Equity practice—53 V., c. 4, s. 23 (N.B.).]—A Bill in Equity, praying for an *ex parte* injunction, must be supported by affidavit. *Glasier* v. *MacPherson*, 34 N.B.R. 206.

—Sale of business—Covenant by vendor—Rival firm—Arts. 957, et. seq., C.C.P.]

See Contract, I.

—Jurisdiction of County Courts to issue.]

See County Courts.

—Disobedience—Motion for attachment—Affidavit.]—See Practice and Procedure, XL.

—Breach—Contempt—Proper proceedings—Form of motion.]

See Practice and Procedure, XIV.

—Construction of statute—Irrigation—Damages—Landslides.]—See Statute, II.

—Street railway contract—Running cars—Injunction.]—See Street Railways.

INNKEEPER.

See Lien, II.

INQUISITION.

See Lunacy.

INSCRIPTION.

—Inscription in review—Signature of attorney—Signed by another person.]—See Solicitor.

INSCRIPTION EN DROIT.

—Cession de biens—Contestation of account—Conclusions—Insufficiency of allegations.]

See Pleading, VII.

—Allegation in pleading—Rejection—Mode of obtaining.]—See Pleading, XVIII.

—When to be filed—New code of procedure.]

See PRACTICE AND PROCEDURE, VI.

—Interdit—Order of prothonotary—Revision—Mode of procedure.]

See PRACTICE AND PROCEDURE, XXV.

INSTITUTE.

—Institute to substitution—Curator—Remploi—Authorization—Family Council—Arts. 945, 948, 981, 984 C.C.]—See CURATOR.

INSURANCE.

I. ACCIDENT INSURANCE.

—Condition in policy—Notice—Condition precedent.]—A condition in a policy of insurance against accidents required that in the event of an accident thereunder, 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 or the local agent:—Held, that the giving of such notice was a condition precedent to the right to bring an action on the policy. *Employers' Liability Assurance Corporation* v. *Taylor*, 29 S.C.R. 104.

II. FIRE INSURANCE.

—Conditions—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 policy after loss—Signification Arts. 1571, 2475, 2478, 2483, 2574, 2576 C.C.—Right of action.]—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 to a 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 Art. 1571 of the Civil Code. Where a condition in a 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 procedent 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 the Quebec and not referred to in the body of the policy, form part of the contract between the parties? *Guerin* v. *Manchester Assurance Co.*, 29 S.C.R. 139.

—Condition—Notice of subsequent insurance—Inability of assured to give notice.]—By a condition in the policy of insurance against fire the insured was "forthwith" to give notice to the company of any other insurance made, or which might afterwards be made on the same property and have a memorandum 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, 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. *Commercial Union Assurance Co.* v. *Temple*, 29 S.C.R. 206.

—Application—Ownership of property insured—Misrepresentation.]—A condition indorsed on a policy of insurance against fire provided that if the application for insurance was referred to in the policy it would be considered a part of the contract and a warranty by the insured, and that any false representation by the assured of the condition, situation and occupancy of the property, or any omission to make known a fact material to the risk would avoid the policy. In the application for said policy the insured stated that he was sole owner of the property to be insured, and of the land on which it stood, whereas it was, to his knowledge, and that of the sub-agent who secured the application, situated upon the public highway:—Held, that as the application was more than once referred to in the policy it was a part of the contract for insurance, and that the misrepresentation as to the ownership of the land avoided the policy under the above condition. *Norwich Union Fire Insurance Co.* v. *LeBell*, 29 S.C.R. 470.

—Condition—Time limit for submitting particulars of loss—Condition precedent—Waiver—Authority of agent.]—A condition in a policy of insurance against fire provided that the assured "is to deliver within fifteen days after the fire, in writing, as particular an account of the loss as the nature of the case permits." Held, following *Employers' Liability Assurance Corporation* v. *Taylor*, 29 S.C.R. 104, that compliance with this provision

was a condition precedent to an action on the policy; held, also, that a person not an officer of the insurance company, appointed to investigate the loss and report thereon to the company, was not an agent of the latter having authority to waive compliance with such condition, and if he had such authority he could not, after the fifteen days had expired, extend the time without express authority from his principal; held further, that compliance with the condition could not in any case be waived unless such waiver was clearly expressed in writing signed by the company's manager in Montreal, as required by another condition in the policy. *Atlas Assurance Co.* v. *Brownell*, 29 S.C.R. 537, reversing 31 N.S.R. 348.

—Condition—Ship insured "while running"—Variation from statutory conditions.]—A policy issued in 1895 insured against fire the hull of the *S. S. Baltic*, including engines, &c., "whilst running on the inland lakes, rivers and canals during the season of navigation. To be laid up in a place of safety during winter months from any extra hazardous building." The *Baltic* was laid up in 1893 and was never afterwards sent to sea. In 1896 she was destroyed by fire:—Held, that the policy never attached; that the steamship was only insured when employed on inland waters during the navigation season or laid up in safety during the winter months; held, also that the above stipulation was not a condition but rather a description of the subject matter of the insurance, and did not come within s. 115 of the Ontario Insurance Act relating to variations from statutory conditions. *London Assurance Corporation* v. *Great Northern Transit Co.*, 29 S.C.R. 577, reversing 25 Ont. App. 393, *sub nom.*, *Great Northern* v. *Alliance Co.*

—Construction of contract—"Until"—Condition precedent — Waiver — Estoppel — Authority of agent.]—Certain conditions of a policy of fire insurance required proofs, etc., within *fourteen days* after the loss, and provided that no claim should be payable for a specified time after the loss should have been ascertained and proved in accordance with this condition. There were two subsequent clauses providing respectively that *until* such proofs were produced no money should be payable by the insurer, and for forfeiture of all rights of the insured if the claim should not, for the space of *three months* after the occurrence of the fire, be in all respects verified in the manner aforesaid:—Held, that the condition as to the production of proofs within fourteen days was a condition precedent to the liability of the insurer; that the force of the word "until" in the subsequent clause could not give to the omission to produce such proofs, within the time specified, the effect of postponing recovery merely until after their production, and that the clause as to forfeiture after three months did not apply to the conditions specially required to be fulfilled within any lesser period.—Neither the local agent for soliciting risks nor an adjuster sent for the purpose of investigating the loss under a policy of fire insurance, has authority to waive compliance with conditions precedent to the insurer's liability or to extend the time thereby limited for their fulfilment; and as the policy in question specially required it, there could be no waiver unless by indorsement in writing, upon the policy signed as therein specified: *Atlas Assurance Co.* v. *Brownell*, 29 S.C.R. 537, followed; *Commercial Union Assurance Co.* v. *Margeson*, 29 S.C.R. 601, reversing 31 N.S.R. 337.

—Mortgage—Cancellation of policy—Double insurance—Proofs of loss.]—A policy of insurance covering the buildings on the mortgaged property and their contents, assigned by the mortgagor to mortgagees as collateral security, cannot be cancelled by the insurance company, at the request of the mortgagees, without notice to the mortgagor. Insurance effected by mortgagees, without the mortgagor's assent, after an attempted cancellation, does not affect the mortgagor's right of recovery on the policy effected by him. Where insurers repudiate liability on a policy, they cannot object that proofs of loss have not been furnished. *Morrow* v. *Lancashire Insurance Co.*, 26 Ont. App. 173, affirming 29 Ont. R. 377.

—Mutual Company—Assessment note—Default—Forfeiture.]—Default in payment of one of the deferred payments of the first instalment of a premium note given by an insurer in a mutual fire insurance company, under s. 129 of the Act, R.S.O. c. 203, does not *ipso facto* work a forfeiture. A notice by the company to the insurer treating the payment as an assessment, and notifying him that in the event of nonpayment the policy would be suspended, is not an assessment under s. 130, and nonpayment pursuant to the notice does not suspend the operation of the policy. *Woolley* v. *Victoria Mutual Fire Ins. Co.*, 26 Ont. App. 321.

—Variation from statutory conditions—"Co-insurance" clause—"Not just and reasonable."]—The plaintiffs, by a contract with the defendants, insured their stock-in-trade against fire for $15,000, "subject to the seventy-five per cent. co-insurance" these words being conspicuously printed in red ink on the face of the policy. The policy contained a "co-insurance" clause, printed in red ink, among the variations of the statutory conditions, as follows:—"The premium having been reduced in consideration of this condition, the insured shall during the currency of this policy maintain insurance concurrent with this policy on each and every item of the property insured to the extent of seventy-five per cent. of the actual cash value thereof, and if the insured shall not do so, the company shall only be liable for the payment of that proportion of the loss for which the company would be liable if such amount of concurrent insurance had

been maintained." During the currency of the policy the plaintiffs sustained a loss by fire of $42,120.17, the cash value of the property insured being $115,000, and the whole amount of insurance upon it, including the $15,000 named in the defendant's policy, $70,000. The defendant had two alternative rates of premium, one for insurance with, and the other for insurance without, the "co-insurance" clause, the former being substantially less than the latter, but the plaintiffs had no actual knowledge of this, except in as far as that knowledge was obtained from the terms of the policy:—Held, following *Wanless* v. *Lancashire Ins. Co.*, 23 Ont. App. 224, that the "co-insurance" clause was a condition in variation of statutory conditions 8 and 9; and, as it could not, under the circumstances, be found to be "not just and reasonable," within the meaning of s. 171 of the Ontario Insurance Act, R.S.O. c. 203, it was binding on the insured. *Eckhart* v. *Lancashire Insurance Co.*, 29 Ont. R. 695.

—**Mortgage—Insurance of Property by mortgagee — Collection of amount of insurance.**]—Where buildings on property hypotheticated for the security of a loan are insured by the mortgagee as additional security for the sum lent, and a loss by fire occurs, the mortgagee is not obliged to institute proceedings against the insurance company for the recovery of the amount insured, more especially when, as in the present case, the only reason given by the company for not paying the loss is one resulting from the acts of the mortgagor. The latter may ask to be subrogated in the rights of the mortgagee, but only on tender to him of the amount of the mortgage debt. *Montreal Loan and Mortgage Co.* v. *Denis*, 14 Que. S.C. 106.

—**Proofs of loss—Waiver—Appraisement—Prescription of action.**]—Where the policy contains a condition to the effect that the company shall not be held to have waived any provision or condition of the policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal, the insured or his representatives is not relieved from the obligation of furnishing proofs of loss as required by the conditions of the policy, by the fact that the company and the insuree entered into bonds of appraisement after the fire,—this being a mere conservatory proceeding in the interests of both parties, to establish the amount of the loss at a time most favourable for that purpose.—The pretension that the insured and his representatives were unable to furnish such proofs in consequence of the loss of the policies, cannot avail where it is neither alleged nor proved that the policies were lost prior to the fire or within sixty days thereafter—the time within which proofs of loss had to be made.—Where a condition of the policy requires that actions based thereon shall be commenced within twelve months from the date of the fire, an action commenced after that date is prescribed. *Prévost* v. *Scottish Union Ins. Co.*, 14 Que. S.C. 203.

—**Lessor and lessee — Right of lessor as to moneys representing loss by fire of effects garnishing premises.**]—The lessor has no privilege for rent on the moneys in the hands of an insurance company, representing the loss by fire of effects garnishing the premises leased. *Vaughan* v. *Pelletier*, 15 Que. S.C. 123.

—**Incorporation of terms of expired in new policy—Concealment of material fact.**]—A policy of insurance in the A. company was issued to the plaintiff upon an application in which it was stated by him that there was no judgment of seizure against him at the time of the making of said policy. On the expiry of the policy the plaintiff took out a policy in the defendant company, in which it was stipulated to be a condition precedent to its issue that it was based upon the representations and warranties contained in the application upon which the policy in the A. company was issued. Between the issue and expiry of the first named policy a judgment was recovered against the plaintiff and execution issued. This fact the plaintiff did not disclose to the defendant company:—Held, that the representation by the plaintiff was not limited in its application to the circumstances at the date of the policy of the A. company, but applied to the circumstances at the date of the policy of the defendant company. *Long* v. *Phœnix Ins. Co.*, 34 N.B.R. 223.

—**Adjustment of loss—Approved by general agent, and approval communicated to assured—Particulars of loss—Estoppel.**]—The general agent of the defendant company at H. sent an adjuster to A. for the purpose of adjusting a loss under a policy on a general stock of merchandise owned by plaintiffs, which had been destroyed by fire. The adjuster, without proceeding in the usual way, made an estimate of the amount of the loss, and prepared proofs, which were signed and attested by plaintiffs. The adjuster then returned to H. and handed the proofs to the general agent of the company, who, thereupon, wrote to the local agent at A., informing him that a cheque for the amount of the compromise arranged between the adjuster and K., one of the plaintiffs would be sent in due course. This adoption of the compromise effected by the adjuster having been communicated to plaintiffs by the local agent of the company, who was authorized for that purpose:—Held, that the company was bound thereby. One of the conditions of the policy required the insured to deliver, within fifteen days after the fire, as particular an account of the loss as the nature of the case permitted. In the method of estimating the amount of the loss adopted by the defendant's adjuster, no account of the quantities and descriptions of goods in the store, just before the fire, was given or attempted to be

given, and the account was, therefore, in this respect, not as particular as it might have been. Per Ritchie, J.:—Held, nevertheless, that as the mode adopted was the one selected by defendant's adjuster, and plaintiffs afforded him every facility and information for making it up to his satisfaction, and he had free access to all books and accounts, there was no reason for setting aside the finding of the jury, that plaintiffs delivered as particular an account of the loss as the nature of the case permitted. Held, also, that the defendant company, after the time for putting in proofs had expired, should not be permitted to object that all possible information had not been furnished, in order that they might estimate the loss in a way different from that selected by their own adjuster and embodied by him in the proofs of loss, when the fullest information that he required was furnished him, and particularly when the jury had found that he represented to the plaintiffs that the proofs furnished were in compliance with the conditions of the policy. *Kirk* v. *Northern Assurance Company*, 31 N.S.R. 325.

—Condition as to appraisal—Proofs of loss—Waiver.]—A policy of fire insurance issued by the defendant company contained a provision that, "in the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent appraisers," etc. — Held, per Graham, E.J., McDonald, C.J., and Ritchie, J., concurring, that the company having repudiated all liability in respect of the claim, they most distinctly averred that there was no disagreement as to the mere amount of the loss, and, therefore, no appraisal would be required, and that the assured, having asked for an appraisal, and having named two disinterested appraisers, was discharged from the performance of the condition by the company's refusal.—Held, also, that the matter of the appointment of appraisers was one for negotiation, and that the plaintiff, M., having named one person who was not accepted, was not, therefore, debarred from naming another. Per Meagher, J., dissenting.—Held, that the trial judge having found that there was a disagreement as to the amount of loss, within the meaning of the clause of the policy on that subject, there was no sufficient reason for dissenting from his finding.—Also, that in the event of a disagreement, such as arose in this case, an appraisement, in the manner prescribed in the conditions, became an essential step, and that the award or appraisement was a necessary part of the proofs of loss to be furnished.—Also, that there was no such waiver as would entitle plaintiffs to recover, in the absence of such compliance, with the conditions of the policy.—Also, that a denial of liability, which may have been founded upon such want of compliance, would not operate as a waiver. *Margeson* v. *Guardian Fire and Life Assurance Co.*, 31 N.S.R. 359.

III. Life Insurance.

—Art. 2590 C.C.—Validity of life policy—Lawful holder.]—In an action on a policy of life insurance:—Held, that the plaintiff was not a lawful holder. As "the protector of the deceased whenever he stood in the need of protection," he had not an insurable interest in his life within the meaning of Art. 2590 of the Civil Code of Lower Canada:—Held, further, that a condition in the policy that the same should on the lapse of a year or upwards during which premiums have been regularly paid become incontestable is no answer to an objection founded on the terms of the code. *Anctil* v. *Manufacturers' Life Ins. Co.* [1899], A.C. 604, affirming 28 S.C.R. 103.

—Benefit association—Payment of assessments—Forfeiture—Waiver—Pleading.]—A member of a benefit association died while suspended from membership for non-payment of assessments. In an action by his widow for the amount of his benefit certificate it was claimed that the forfeiture was waived:—Held, that the waiver, not having been pleaded, could not be relied on as an answer to the plea of non-payment. *Allen* v. *Merchants Marine Ins. Co.*, 15 S.C.R. 488 followed. *Supreme Tent of the Macabees* v. *Hilliker*, 29 S.C.R. 397.

—Friendly society—Liquidation—Master's report—Practice—Notice of filing—Appeal—Total disability benefit—Repeal of provisions as to—Assessments — Non-payment — Suspension — "Fixed dates"—Time—Notice.]—The provision of Con. Rule 769 that notice of filing a Master's report is to be served upon the opposing party is a prerequisite to the report becoming absolute. Where the report is upon a claim to rank on the assets of an insurance corporation in compulsory liquidation under the Ontario Insurance Act, R.S.O. c. 203, notice of filing the report given in the *Ontario Gazette* and other newspapers, pursuant to s. 193 of that Act, is not tantamount to personal service. Where the section of the constitution and rules of a friendly society which provided for payment of a benefit to the insured upon total disability was duly abrogated and repealed by the society during the membership of the insured:—Held, that he was bound by such action. *Baker* v. *Forest City Lodge*, 28 Ont. R. 238, 24 Ont. App. 585, followed. By s. 165 of R.S.O. c. 203, it is provided, in effect, that where the time for payment of assessments is not definitely fixed in the contract with the insured or in the by-laws of the society, there shall be no suspension or forfeiture for non-payment unless specific notice of the amount is given, as mentioned in s.s. 2, and default thereafter for not less than thirty days: the meaning of which is that in the case of assessments which by implication are of fixed amount and which by the rules or constitution of the society are payable at fixed dates, it is left

to the society to provide for the consequence of non-payment; but if this periodicity of payment does not exist, the statute intervenes and regulates the procedure. By the constitution and rules of the society, the amount and frequency of the assessments depended on the discretion of the governing board. Notice of assessments was given to the members merely by insertion in the official journal of the society, sent by post to the last known address of each member. The rules provided that the assessments were to be levied on the first day of the month and were to be paid within thirty-one days thereafter. The minimum assessment for each member was fixed according to age at entrance, but the assessments upon that basis were single, double, or treble, according to the needs of the society:—Held, that the assessments could not be regarded as "payable at fixed dates;" and as, in the case of the member whose standing was in question, the notices to pay three assessments levied, in the way mentioned, upon the first days of three consecutive months, was less than thirty days, the statute had not been complied with, and no forfeiture or suspension had been incurred. *Hartley* v. *Allen*, 4 Jur. N.S. 500, 31 L.T.O.S. 69, 6 W.R. 407, not followed. *Re Select Knights of Canada, Cunningham's case*, 29 Ont. R. 708.

—Benefit of wife and children—Apportionment—Will—Abatement.]—A testator had three policies upon his life, each for $2,000, payable to his wife and children; and, had no change been made, they would have been entitled to the whole sum in equal shares. By his will he gave a specific portion of the $6,000 to each of eight of his nine children, some of the portions being more and some less than $600, the total given being $5,100; but said nothing as to his wife or remaining child. By s. 160 of the Ontario Insurance Act, he had power to "make or alter the apportionment:"—Held, that what he did by his will was a reapportionment; and the former apportionment remained, except in so far as it was changed by the reapportionment. Had the policies all been good, each of the eight children would have been entitled to the specific sum given him or her by the will, and the wife and the remaining child would have been entitled, by virtue of the original apportionment in their favour, varied by the reapportionment, to the $900 balance, divided between them equally. But, as one of the policies turned out to be worthless, and there was only $4,000 to distribute, the sum going to each of the beneficiaries must abate in due proportion. *Re Carberry*, 30 Ont. R. 40.

—Reapportionment by will—Cancellation and re-issue of policies—60 V., c. 36 (O.)—Creditors.]—*McIntyre* v. *Silcox*, 30 Ont. R. 488, affirming 29 Ont. R. 593, and C.A. Dig. (1898) 220.

—"Preferred beneficiaries"—R.S.O. c. 203—Will—General devise—Apportionment—After acquired policy.]—A devise by a testator of all his life insurance policies in favour of "preferred beneficiaries" as defined by the Ontario Insurance Act, R.S.O. c. 203, is sufficient under s. 160 of the Act to vary a policy or declaration or apportionment previously made without specifically identifying the policies by number, name, date or amount insured. Such a devise does not affect a policy issued after the date of the will. *Re Lynn*, 20 Ont. R. 473, and *McKibbon* v. *Feegan*, 21 Ont. App. 87, commented on. *Re Cheeseborough*, 30 Ont. R. 639.

—Executors and Administrators—Domicil of insured—Possession of Policy—Assignment—Foreign administrator—Foreign Creditors—Agreement—Construction.]—The company, having its head office in Ontario, insured the life of a person then domiciled in Ontario, by two policies, one for $2,000 and the other for $3,000, payable to his executors or administrators at his death, at such head office. These policies were assigned by the insured to certain persons in Ontario, and an agreement in writing was subsequently made between the insured and these persons, by which his indebtedness to them was settled by his giving two promissory notes for $500 each, and by which it was also provided that the policies should be reassigned to the insured "upon the payment . . of the first of the said $500 promissory notes, and shall in the meantime be held as collateral security for the payment of the said $500 note . . and the said (insured) shall be bound to keep up all premiums in the meantime, and if not paid when due, the said premiums may be paid by (the assignees), and the payments so made shall be added to said (insured's) indebtedness, to which said policies shall remain as collateral security therefor." The insured died in a foreign country, where he had been for some time domiciled, having in his actual possession, at the time of his death, one of the policies. Letters of administration to his estate were granted by a Court in the country where he died to a person there, and also by a Surrogate Court in Ontario to one of the assignees of the policies:—Held, that, although the locality of a specialty is where it is conspicuous at the time of the death, that means, where it is rightly conspicuous, and, as the assignees were entitled in law to the possession of the policy, it was conspicuous, not where it actually was at the death, but where it rightly ought to have been; and the rule that the locality of a specialty is the jurisdiction in which letters of administration are to be granted is subject to this qualification—if the specialty can be recovered and enforced in the country where it is found at the death; and, assuming that letters were properly granted by the foreign Court, the policy could not have been enforced and the moneys payable thereby recovered in the foreign country, for the insurance company, being as to that country a foreign corporation and not doing business therein, could not be sued there. The appointment of an

administrator in Ontario was, therefore, necessary; and the insurance company having paid the insurance moneys into Court, they should be handed over to that administrator to be administered; held, also, that, upon the true construction of the agreement, the assignees were entitled only to the amount of the first one of the promissory notes, with interest from its maturity, and to the amount of the premiums paid by them since the date of the agreement, with interest. *Re Ontario Mutual Life Assurance Co. and Fox*, 30 Ont. R. 666.

—Insurance by wife in husband's name—Ratification—Beneficiaries—Incorporation of application—Insurable interest of mother in life of child.]—Where a policy of insurance was effected by a wife in her husband's name without his knowledge or consent, contrary to the rule of the insurance company, but subsequently, and after acquiring such knowledge, the husband procured two other policies to be issued in his name in the same company, signing the applications therefor, and acquiescing in the payment of the premiums on the three policies, and on these policies lapsing for default in payment of the premiums he revived the first policy, he was held estopped from denying its validity. Where the name of a person interested in a policy of insurance is not inserted therein, but is set out in the application therefor, which is made part of the policy and incorporated therewith, it is sufficient under 14 Geo. III., c. 48, ss. 1 & 2. and R.S.O. c. 203, s. 150 (1). An insurance in a New York company, effected by a mother on the life of her child under age, is valid, whether governed by the Ontario or New York law, the R.S.O. c. 203, s. 150, s.s. 5, making such insurance valid in Ontario, whether effected before or after the passing of that Act; while the American decisions, referred to in the case, shew its validity according to the law of the State of New York. *Wakeman* v. *Metropolitan Life Ins. Co.*, 30 Ont. R. 705.

—Misrepresentation as to age—Effect of—Dominion License—Novation—Registration in Ontario.]—A Canadian benefit association, in which the assured held certificates of insurance, transferred its assets and business to an American association, who issued new certificates, sealed with its seal and signed in the United States by the president and treasurer, which were sent to, but were not to be operative until countersigned by, the Canadian agent, and delivered to the insured on payment of the premiums; all of which was done. The claimants sought to prove claims on the certificates in winding-up proceedings, and the Master found on the evidence, in one case consisting partly of an entry in an alleged family Bible containing a record of births, that misrepresentation as to age had been made in both cases by the assured and disallowed the claims, and that as the contracts had been made with a friendly society previous to the passing of 55 V., c. 39 (O.), the Insurance Corporations Act, 1892, the claimants were not entitled to the benefit of s. 34 of that Act, under which misstatements as to age made in good faith do not avoid the contract, and, following *Cerri* v. *Ancient Order of Foresters*, 25 Ont. App. 22, the misrepresentation being material was fatal to the contracts:—Held, on appeal, that there was a novation and a new contract between the American association and the assured, which came into existence after the above Act came into force, as the association were validly doing business in Canada by license under s. 39 of R.S.C. c. 124; that the contract being completed in Canada was subject to statutory conditions imposed for the benefit of the public, and that the claimants were entitled to the benefit of s. 33 & 34 of 55 V., c. 39 (O.). *Mason* v. *Massachusetts Benefit Life Association*, 30 Ont. R. 716.

—Conditions of policy—Breach.]—The defendant issued a policy upon the life of plaintiff's minor son, aged eight years, by the conditions of which it was stipulated, among other things, that no obligation was assumed by the company unless on the date thereof the assured was in sound health; and further, that the policy would be void if the assured, before its date, had been attended by a physician for any serious disease or complaint, or had had before said date any disease of the heart, etc. It was proved that the assured, about a year previous to the date of the policy, had been treated in a hospital for an affection of the heart, and when discharged was only "improved" and not convalescent, and that after the date of the policy he was again treated in a hospital for a heart complaint.—Held, that the policy was void and of no effect. *Tompkins* v. *Metropolitan Life Ins. Co.*, 14 Que. S.C. 246.

—Succession duty—Beneficiary domiciled in B.C.]—The proceeds of a life policy payable at death without the Province are not liable, in the hands of a beneficiary domiciled in the Province, to succession duty under R.S.B.C. c. 175. *Re Templeton*, 6 B.C.R. 180

—Infant—Contingent interest in fund in Court—Order for allowance for maintenance—Security by way of life insurance of infant.]

See INFANT, III.

—Policy in favour of wife—Disposal by will—58 V., c. 25 (N.B.)—Will made before Act—Application of Act.]—See WILL, II.

IV. MARINE INSURANCE.

—Abandonment—Repairs—"Boston clause"—Findings of jury—Setting aside verdict.]—*Insurance Co. of North America* v. *McLeod*, 29 S.C.R. 449, reversing 30 N.S.R. 480; C.A. Dig. (1898) 224; and ordering a new trial.

INTERDIT.

— Habitual drunkenness — Wife curatrix — Demand of abandonment.]

See BANKRUPTCY AND INSOLVENCY, IV.

—Order of prothonotary—Revision—Mode of objection.]

See PRACTICE AND PROCEDURE, XXV.

—Insanity—Judgment of interdiction—Review — Abandonment — Attorney — Costs — Art. 223 C.C.P.]—See PRACTICE AND PROCEDURE, I.

INTEREST.

—Expropriation—Compensation—When interest begins to run.]—Interest may be allowed from the date of the taking of possession of any property expropriated by the Crown, even if the plan and description be not filed on that date. *Drury* v. *The Queen*, 6 Can. Ex. C.R. 204.

—Interruption of prescription—Instance claiming capital—Arts. 2224, 2250, 2265 C.C.]—The prescription of the interest on a sum is interrupted pending the *instance* by which the capital is claimed whatever may be the duration of such *instance*. *Wright* v. *Crain*, 7 Que. Q.B. 524.

— Municipal corporation — Warrant drawn by police committee—Account current.]—A warrant issued by the police committee of the city council, addressed to the city treasurer, is not a bill of exchange, though made payable to order. The drawers and drawee of such a document, representing different departments of the same corporation, are in reality the same person, viz.: the corporation itself. Such a warrant is nothing more than a certificate or voucher that the amount is due to the person in whose favour it is drawn, and it does not bear interest even after demand and refusal of payment.—An account current does not bear interest from demand and refusal of payment. *Charlebois* v. *City of Montreal*, 15 Que. S.C. 96.

—Attorney's costs—Action against client—Arts. 556 C.C.P.]—Interest on costs due by a client to his attorney runs only from the date of the judgment in an action by the attorney for such costs. *Saint Pierre* v. *Chartrand*, 2 Que. P.R. 290.

—Deed of obligation—Express contract—Réponse en droit.]—In an action based upon a deed of obligation the plaintiff cannot claim interest in addition to the capital without alleging an express stipulation for its payment in the deed or that defendant has been put *en demeure* to pay it, and in default of such allegation the part of the action claiming the interest will be dismissed on a *réponse en droit*. *McLeod* v. *Lemay*, 5 R.L.N.S. 227.

—Claim for interest on bill of exchange—Liquidated damages.]—See DEBTOR AND CREDITOR.

—Arrest of debtor—Claims for interest on debt—Affidavit.]—See DEBTOR AND CREDITOR, II.

—Money deposited in Court—Intervention contesting right to withdraw—Dismissal of intervention—Suit against intervenant for interest.]

See EVIDENCE, VII.
" MORTGAGE, X.

— Municipal corporation — Arbitration and award—Lands injuriously affected—Corporation —Interest.]

See MUNICIPAL CORPORATIONS, IX.

INTERNATIONAL LAW.

See CONFLICT OF LAWS.

INTERVENTION.

—Saisie-arrêt after judgment—Deceased plaintiff —Arts. 607, 677 C.C.P.]

See PARTIES, III.
" PRACTICE AND PROCEDURE, XXXVI.

INTERPLEADER.

See PRACTICE AND PROCEDURE, XXXIV.

IRRIGATION.

—Under British Columbia statute—Injunction—Liability for damages—Land slides.]—Where the effect of British Columbian legislation was to authorize the respondents to irrigate their soil by the compulsory diversion of water from any adjacent stream, lake or river, by conveying it over lands which do not belong to them, and to run the surplus water after irrigation through adjacent lands by means of flumes, ditches or drains, all subject to provisions for compensation, and the respondents brought water upon their land in such manner as to be the substantial cause of damage to the appellants' line of railway by causing a slide of their land:—Held, that, in the absence of provisions shewing an intention on the part of the Legislature to take away the appellants' right to protect their property from invasion, they were entitled to an injunction to prevent the respondents' user of the water in disregard of their common law obligation to do no damage to the appellants' land. *Canadian Pacific Ry. Co.* v. *Parke* [1899] A.C. 535, reversing 5 B.C.R. 507.

JUDGE.

—Jurisdiction—Judicial abandonment—Authority to curator to sue.]—See ACTION, III.

JUDGMENT.

I. Abandonment.

—Implied abandonment—Abandonment by acts of party.]—Although the abandonment (*renonciation*) of a judgment will not be presumed it can be made by means of acts which can only be interpreted as expressive of a willingness to abandon. If the question arises as to the abandonment of a judgment ordering the resiliation of a sale of an immovable in a case in which the registry of a hypothec could only be removed within five days from signification of the judgment, the following facts taken together cannot be interpreted otherwise than as evidencing an intention to abandon: 1. Delay for two years to make signification of the judgment. 2. Failure to register. 3. Remaining all this time in possession as proprietor. 4. Hypothecating the immovable. *Labbé* v. *Routhier*, 8 Que. Q.B. 263.

—Abandonment of interlocutory judgment—Validity—Signature.]—The abandonment of an interlocutory judgment, to be valid, should be signed by the abandoning party himself or by his attorney specially authorized for the purpose. *Foisy* v. *Plamondon*, 15 Que. S.C. 425.

—Action to annul—Subsequent abandonment—Dismissal of action—Art. 170 C.C.P.]—The abandonment of a judgment after signification of an action to annul it is not a ground for dismissal of such action on *exception déclinatoire ratione personæ*, but the record will be transmitted to the competent Court. *Corporation of Ham-Nord* v. *Juneau*, 2 Que. P.R. 138.

—Acceptance—Motion to reject—Mandate of attorney—Art. 548 C.C.P.]—An attorney *ad litem* cannot desist from a judgment rendered in favour of his client without being specially authorized to that effect. If such abandonment is served on the adverse party, but not filed, an acceptance thereof by the said adverse party and the filing by him of the said copy, are of no effect, and such documents will be rejected from the record on motion to that effect. *Warminton* v. *Town of Westmount*, 2 Que. P.R. 139.

II. Assignment.

—Transfer to attorney—Litigious rights.]—The assignment of a judgment to attorney exercising his functions in the Court which rendered it is not a purchase of litigious rights forbidden by the Quebec Code. *Wilson* v. *Lemonde*, 2 Que. P.R. 156.

III. Competent Jurisdiction.

—Presumption in favour of correctness.]—Until it is reversed, there is a presumption in favour of the correctness of every judgment of a Court of competent jurisdiction. *Thuresson* v. *Thuresson*, 18 Ont. Pr. 414.

IV. Confession of Judgment.

—Inscription for judgment on confession—Notice to defendant—Confession for stated sum—Judgment maintaining saisie-gagerie and annulling case—Arts. 529, 534 C.C.P.]—A defendant who, after appearance by attorney, has filed a confession of judgment which was accepted by the plaintiff, is entitled, under the provisions of Art. 534 C.C.P., to a notice of inscription for judgment on such confession of at least one clear day before that fixed for the signing of judgment.—When the defendant, sued for rent due and accruing due, with *saisie-gagerie* and conclusions demanding resiliation of the lease, has confessed judgment for the amount of the rent due, the prothonotary upon such confession cannot maintain the *saisie-gagerie* nor give judgment for the resiliation. *Boulrice* v. *Rhéaume*, 15 Que. S.C. 20.

— Confession as to part — Particulars.] — A defendant who has filed a partial confession of judgment can be compelled to furnish particulars of the items of the plaintiff's account which are covered by such confession. *Lafortune* v. *Town of Joliette*, 2 Que. P.R. 24.

V. Draft of Judgment.

—Signature of judge—Error.]—The draft of judgment which has been signed by the judge who presided at the trial and pronounced the judgment in open Court, must be held to be the judgment of the Court, and its validity as such is not affected by the circumstance that, through error, another judge had previously paraphed the draft as having been rendered by him, nor by the fact that at the time the inscription in Review was made, no formal draft of the judgment had been signed by the judge who rendered it. *Guerin* v. *Fox*, 15 Que. S.C. 199.

VI. Effect of Judgment.

—Saisie-arrêt—Condemnation of tiers-saisie.]—When judgment has been given condemning the *tiers-saisi* to pay to the seizing creditor (*saisissant*) there is nothing more for the subsequent seizing creditors to do. *Pampalon* v. *Lortie*, 15 Que. S.C. 337.

VII. Enforcing Judgment.

—Exercise of a right declared by a judgment to belong to a party—Art. 600 C.C.P.]—By the final judgment in a cause, it was expressly declared that the plaintiff, defendant in the present case, was and had been in possession for over a year of certain land, and that the present plaintiff had disturbed him in his possession by erecting the wall of a building on a portion of the land, and the present plaintiff was ordered to demolish and remove the wall, and in the event of his making default so to do, the present defendant was authorized to have the wall demolished and removed at the present plaintiff's expense. The latter now alleged that the plaintiff in the former suit was about to execute the judgment himself, and that it could not be legally executed except by a writ issued in the name of the Sovereign, and he asked that defendant be enjoined from proceeding to execute the judgment: — Held, that the fact that a right is by a judgment declared to belong to a party, and that he is by such judgment declared free to exercise such right, has not the effect of rendering the exercise by him of such right a putting in execution of a judgment within the meaning of Art. 600 C.C.P. or of rendering it necessary for him, in order to exercise such right, where such exercise involves no dispossession of the party as against whom such right has been declared to exist, and no compulsory enforcement of an order of the Court upon or against such adverse party, to first cause a writ to be issued in the name of the Sovereign; and the action was therefore dismissed. *Gratton* v. *Gauthier dit Landreville*, 14 Que. S.C. 233.

—Costs distraits — Saisie-arrêt — Assignment — Litigious rights—Interest.]—A judgment for debt and costs may be executed without the consent of the attorney who obtains it, and in whose favour distraction of costs was granted.—A judgment against several defendants may be executed by way of *saisie-arrêt* in the hands of one of them to seize what he owes to the others.—A *tiers-saisi* has sufficient interest to demand that the execution of the judgment on which the seizure is made and which has been assigned, shall be made by the real creditor, and proof on the merits (*preuve avant faire droit*) will be ordered upon the allegations bringing in question the interest of the plaintiff in such execution. *Wilson* v. *Lemonde*, 2 Que. P.R. 156.

VIII. Execution.

—Serious assault—Damages—Costs—Contrainte par corps—Art. 836 C.C.P.]—*Contrainte par corps* may be ordered in execution of a judgment awarding damages for a grievous assault, as well as for the costs of such judgment and incidental costs incurred even after it was pronounced.—It is not necessary, under Art. 836 C.C.P., that a rule for arrest (*contrainte par corps*) in execution of a judgment awarding damages for personal injuries, should be preceded by an order to pay, nor a notice to the debtor that he will be arrested in default of payment.—The *contrainte par corps* will not be prevented by the abandonment which the debtor makes of his property for benefit of his creditors, though the delays for contesting his statement of accounts have not expired. *Peltier* v. *Martin*, 14 Que. S.C. 223.

—Execution after notice—Sheriff's poundage—Making order of Supreme Court a judgment of the Court below.]—A plaintiff is justified, under Rule 683 of The Queen's Bench Act, 1895, in issuing executions and certificates of judgment immediately on judgment being entered, notwithstanding defendant has given notice of appeal to the Supreme Court; and although, upon the perfecting of the security for the appeal, an order has been made setting aside the executions, the plaintiff is entitled, after dismissal of the appeal, to the costs of the executions and certificates. *Clarke* v. *Creighton* (1890), 14 Ont. Pr. 34 followed. The order setting aside the executions having reserved the question of the sheriff's fees, but made no reference to poundage, such cannot be ordered afterwards in view of s. 48 of The Supreme Court Act, R.S.C. c. 135. It is doubtful whether it is necessary to make the judgment of the Supreme Court an order of this Court for any purpose when the appeal is simply dismissed, and at any rate, the costs of an application to do so should not be given when not so ordered upon the application. *Day* v. *Rutledge*, 12 Man. R. 451.

IX. Final Judgment.

—Final and interlocutory judgments—Bornage.]—When a judgment, apparently interlocutory, really decides the contestation between the parties, it was held to be a final judgment.—A judgment which fixes the division line between the properties of the plaintiff and defendant, and which orders *bornes* to be placed thereon, is a final judgment. All that follows such a judgment is merely the execution thereof, when the contestation between the parties was to determine that division line. *Singster* v. *Lacroix*, 14 Que. S.C. 89.

—Line between adjoining lots of land—Encroachment—Boundary marks.]—Where surveyors were appointed to fix boundaries, and their report was received, but the Court before adjudicating on the merits ordered the surveyors to place boundary marks, such judgment is a final judgment not susceptible of being revoked by the same Court, in so far as it pronounced on the *fond*

of the cause and determined the line of separation between the properties; but in so far as it ordered the actual operation of placing boundary marks, it was merely preparatory to the final judgment, and none of the parties having asked for such actual placing of marks, and no marks having been placed, this part of the judgment might be revoked by the same Court. *Barry* v. *Rodier*, 14 Que. S.C. 372.

—Privilege—Contestation—Registry—Rejection of notice—Judgment for valuation—Appeal de plano—Art. 2013 C.C.—Art. 392 C.C.P.]

See APPEAL, V.

—Exception déclinatoire — Appeal — Arts. 46, 170 C.C.P.]—See APPEAL, VIII.

—Réformation de compte—Leave to appeal.]

See APPEAL, V.

X. FOREIGN JUDGMENT.

—Foreign judgment for alimony—Action for arrears.]—Plaintiff, in 1891, recovered a consent judgment against the defendant in Ontario for alimony and maintenance, the judgment being a confirmation, subject to certain provisions, of an agreement previously made for the maintenance of the wife and children:—Held, that an action lay on the judgment for arrears of alimony and maintenance. *Nouvion* v. *Freeman*, L.R. 15 App. Cas. 1, specially referred to. *Hadden* v. *Hadden*, 6 B.C.R. 340.

XI. JUDGMENT BY CONSENT.

—Company—Ultra vires contract—Consent judgment thereon—Validity.]—See COMPANY, I.

—Action against incorporated company—Forfeiture of charter—Estoppel—Compliance with statute—Res judicata.]—See RES JUDICATA.

XII. JUDGMENT BY DEFAULT.

—Tiers saisi—Appearance—Filing—Contestation of declaration.]—The *tiers saisi* who has appeared and made his declaration, but has not filed his appearance on the contestation of the declaration by plaintiff, cannot be considered in default, and plaintiff cannot under such circumstances inscribe for judgment by default on his contestation of the declaration. *White* v. *Sabiston*, 14 Que. S.C. 267.

And see PRACTICE AND PROCEDURE.

XIII. NULLITY.

—Commissioners' Court—Art. 1275 C.C.P.]—In an action in the Commissioners' Court, where the defendant has appeared and filed a plea, he is entitled, under Art. 1275 of the Code of Civil Procedure, to have the case continued to a subsequent day for trial, and a judgment pronounced against him on the same day that he appears, is illegal and will be set aside. *Crevier* v. *Brassard*, 15 Que. S.C. 236.

XIV. OPPOSITION.

—Final judgment — Art. 1163 C.C.P.]—Final judgments only are susceptible of opposition, and consequently an opposition to a judgment rendered upon a petition by one of the parties to the suit praying for disavowal of certain proceedings will not be received, inasmuch as the judgment upon such petition is not a final judgment. *Mireau* v. *Gorn*, 2 Que. P.R. 277.

XV. REQUÊTE CIVILE.

—Inscription for proof and hearing—Peremptory list—Notice.]—Under a local practice prevailing in the Superior Court, in the district of Montreal, the plaintiffs 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 defendants. The defendants did not appear when the case was taken up for proof and hearing and judgment by default was entered in favour of the plaintiffs. The defendant filed a *requête civile* asking for the revocation of the judgment to which the plaintiffs demurred. On appeal to the Supreme Court of Canada against the judgment maintaining the demurrer and dismissing the *requête* with costs:—Held, 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, and that the defendant was entitled to have the judgment revoked upon *requête civile*. *Eastern Townships Bank* v. *Swan*, 29 S.C.R. 193.

— Opposition to judgment—Delay—Dismissal—Requête civile after.]—The fact that a defendant condemned *ex parte* has already produced an opposition to the judgment which was rejected as not having been filed within the time fixed by Art. 1166 C.C.P. does not prevent him from proceeding against the judgment by way of *requête civile* if he is yet within the time prescribed for so doing. *Cautin* v. *Braham*, 15 Que. S.C. 454.

—Dismissal of opposition—Recourse of opposant.]—When an opposition is dismissed because the *opposant* is present neither in person or by attorney, his recourse is to proceed anew by opposition, and he cannot proceed by *requête civile* against the judgment of dismissal. *Vezina* v. *Dastons*, 14 Que. S.C. 465.

— Art. 1177 C.P. — Opposition — Notice.] — A plaintiff who has received notice to contest an opposition and also notice of inscription for *enquête* and merits ex parte on the opposition, has no right to make a *requête civile* against the judgment maintaining the opposition, because such notices were not served

on all parties in the cause, nor because the *enquête* was not made before the open Court. *Paquette* v. *Morin*, 2 Que. P.R. 21.

—Order for saisis—Opposition—Arts. 1166, 1167, 1177, 1182 C.C.P.]—An order to stay proceedings (*saisis*) on a *requête civile* cannot be granted in a case where the judgment sought to be quashed is susceptible of *opposition à jugement*. *Mathieu* v. *Corbeil*, 2 Que. P.R. 102.

—Judgment by default—Absence of counsel—Art. 1177 C.C.]—Where a cause has been inscribed for *enquête* and hearing on the merits and the parties having been called the defendant makes default, his counsel being engaged in a cause in the Circuit Court, whereupon plaintiff obtains judgment on promissory notes, there is no ground for granting a *requête civile* against such judgment which does not come within any of the cases mentioned in Art. 1177 C.C. *Dumouchel* v. *Christin*, 5 R.L.N.S. 221.

XVI. Setting Aside.

—Commissioners' Court—Written plea—Postponement of hearing—Art. 1275 C.C.P.—Certiorari.]—If a written defence is filed to an action before the Commissioners' Court, the trial must be postponed, and if the case is tried on the day for return of the writ in the absence of the defendant and his counsel, a writ of certiorari will lie against the commissioners to quash the judgment thereon. *Crevier* v. *Banque Ville Marie*, 2 Que. P.R. 49.

XVII. Subrogation.

—Coercive imprisonment—Joint defendants—Payment by one.]—A joint co-defendant who has paid the amount of the judgment in full, is subrogated to plaintiff's right for one-half of this amount, and to the right to ask coercive imprisonment against his co-defendant, if plaintiff had such right. He cannot, *de plano*, claim one-half of the costs paid by him to the plaintiff. *Bury* v. *Lynch*, 2 Que. P.R. 239.

XVIII. Transfer of Judgment.

—Hypothecary action—Signification of transfer—Proof.]—Where the defendant in a hypothecary action which is brought against him as *tiers détenteur*, based on an alleged transfer of a judgment registered against the immovable, denies all knowledge of the judgment and of the registration, and of the transfer to the plaintiff, it is for the latter to prove the transfer and the signification thereof upon the legal representative of the debtor (the debtor being dead at the date thereof), and that the transfer was registered, and a duplicate of the certificate of its registration together with a copy of the transfer was furnished either to the representatives of the debtor or to defendant or his *auteurs* as *tiers détenteurs* of the property hypothecated. Arts. 1571, 2127 C.C.; *Larose* v. *Content*, 14 Que. S.C. 263.

XIX. Validity.

—Judgment by default entered on unstamped writ—Power of Court to affix stamp after judgment—Violation of Stamp Act, C.S.B.C., 1888, c. 70.]—See Practice and Procedure, LXII.

JUDICIAL NOTICE.

See Evidence, VI.

JURISDICTION.

—Extradition commissioner—Warrant—Fugitive criminal.]—Judges and commissioners in extradition matters can only act judicially within the province for which they have been appointed. *Ex parte Seitz*, 8 Que. Q.B. 345, 3 Can. Cr. Cas. 54.

—School commissioner—Contesting election—Disability.]—The Superior Court has no jurisdiction to adjudicate on the contestation of the election of a commissioner of schools, based upon his disability (incapacité), such proceeding being within the exclusive competence of the Circuit Court or of a Magistrate's Court. *Joyce* v. *Hart*, 14 Que. S.C. 199, affirmed by Court of Review on the merits, 28 June, 1898.

—Superior Court—Special superintendent—Municipality.]—The Superior Court has jurisdiction to entertain an action by a special superintendent appointed by the County Council to recover his costs taxed by the said Council whose decision has been affirmed by the Circuit Court of the County. *Martin* v. *Beauharnois*, 2 Que. P.R. 99.

—Incidental demand—Withdrawal.]—If a party to a suit constitute himself incidental plaintiff, he accepts thereby the jurisdiction of the Court, which otherwise would have been incompetent *ratione materiæ*.—If said party afterwards withdraw such incidental demand, it has no retroactive effect, and cannot deprive the plaintiff of the benefit of such acceptance of jurisdiction. *Auger* v. *Magann*, 2 Que. P.R. 120.

—Conversion of goods—Lex loci.]—The Courts of the Province of Quebec have no jurisdiction to try an action based upon a conversion, in Victoria, of goods shipped there from Quebec, nor a motion to amend a declaration founded on those facts. *Duchaine* v. *Freel*, 2 Que. P.R. 278.

—County Court—City Court of Saint John.]—The County Court Act has the same application to the City Court of Saint John as constituted by Acts of Assembly (N.B.) 52 V., c. 27, as it had to the Court established by Con. Stat., c. 51; and the jurisdiction of the County Court is just as limited now as it was before the passing of the first-mentioned Act. *Simonds* v. *Hallett*, 34 N.B.R. 216.

—**Specific performance—Equity—Exercise of discretion.**]—The exercise of the jurisdiction of Equity as to enforcing specific performance of agreements is not a matter of right in the party seeking relief, but of discretion in the Court to be exercised in accordance with fixed rules and principles. *Calhoun* v. *Brewster*, 1 N.B. Eq. 529.

—**Jurisdiction of Superior Court.**]—Everything is intended in favour of the jurisdiction of a particular Court. *Ritz* v. *Fræse*, 12 Man. R. 346.

—**Judicial abandonment—Authority of curator to sue—Leave by judge.**]—See ACTION, III.

—**Criminal law—Offence committed in one province and completed in another—Place of trial—Letter intended to deceive—Delivery through mail.**]—See CRIMINAL LAW, XII.

See COUNTY COURTS.
" DIVISION COURT.
" JUSTICE OF THE PEACE.
" PRACTICE AND PROCEDURE, XXVII.

JURY.

—**Criminal law—Mixed jury—Language of the defence.**]—See CRIMINAL LAW, XIII.

—**Trial by jury—Requisite amount—Amount demanded—Subsequent partial abandonment (desistement).**]—

See PRACTICE AND PROCEDURE.

JUSTICE OF THE PEACE.

I. APPOINTMENT.

—**Stipendiary or Police Magistrate—Jurisdiction—39 V., c. 16, and 53 V., c. 77 (N.B.).**]—By 39 V., c. 16, provision was made for the appointment by the Lieutenant-Governor in Council of a person, resident in the Parish of Salisbury, in the County of Westmorland, to be a district or stipendiary police magistrate for the said county. By 53 V., c. 77, 39 V., c. 16 was amended by inserting the word "or" between the words "stipendiary" and "police," and it was enacted that any person theretofore appointed as stipendiary and police magistrate, under the words "stipendiary police magistrate," should be held and taken to be a stipendiary and police magistrate for the County of Westmorland. The Royal Gazette, containing the appointment of a person in pursuance of the Act 39 V., c. 16, designated him as "Police Magistrate for Salisbury": Held, that he was appointed for the County of Westmorland. *Ex parte Gallagher*, 34 N.B.R. 329.

II. CONVICTION.

—**Summary Conviction—N.B. Liquor License Act, 1896—Minute of conviction—C.S.N.B. c. 62, s. 22—Refusal of magistrate to give evidence.**]—It is not necessary under Con. Stat. c. 62, s. 22, that a minute of a conviction be entered at the time the conviction is made if the conviction itself be drawn up. On a motion for a rule to quash a conviction on the ground that the presiding magistrate refused to give evidence when requested by the defendants, it must be shewn that the request was made in good faith, and that the defendant was prejudiced by the refusal. Where it was set forth in affidavit what evidence the magistrate was expected to give, but the affidavit shewed that the deponent did not have knowledge that the magistrate could give the evidence, the rule was refused. *Ex parte Flannagan*, 34 N.B.R. 326, 2 Can. Cr. Cas. 513.

III. CRIMINAL PROCEEDINGS.

—**Crim. Code, 687—Coroner.**]—A Coroner is not a Justice within the meaning of s. 687 of the Criminal Code. *The Queen* v. *Graham*, 2 Can. Cr. Cas. 388, 8 Que. Q.B. 167.

IV. DISQUALIFICATION.

—**Bias—Relationship of magistrate—Magistrate a ratepayer.**]—A magistrate is not disqualified from adjudicating upon an information laid under "The Liquor License Act, 1896," by a license inspector, by reason of being related to the wife of the assistant inspector, where such assistant inspector took no part in the proceedings. A magistrate is not disqualified from adjudicating upon an information laid under "The Liquor License Act, 1896," by reason of being a ratepayer of the County, and the penalty sought to be recovered being payable into the County funds. *Ex parte Flannagan*, 34 N.B.R. 326, 2 Can. Cr. Cas. 513.

V. DUTIES OF OFFICE.

—**Mandamus—Criminal law—Procedure—Art. 992 C.C.P.—Crim. Code ss. 558-559.**]—No mandamus will be granted unless it is shewn that the public officer or Court of inferior jurisdiction has omitted, neglected or refused to perform a duty belonging to such officer or any act which by law he is bound to perform. Mandamus will not be allowed to revise the decision of magistrates who have once heard a case and decided it in a matter within their jurisdiction. The law does not oblige a magistrate to issue his warrant except when in his opinion a case for so doing is made out, and under sec. 559 Crim. Code he is not obliged to give all his reasons, he has merely to express his opinion—when he does so the magistrate cannot be considered as having omitted, neglected or refused to perform the duty of his office. *Thompson* v. *Desnoyers*, 3 Can. Cr. Cas. 68.

VI. Jurisdiction.

—Issuing warrant for arrest without jurisdiction —Bona fide belief in legal authority.]—The defendant M. laid an information before the defendant J., a Justice of the Peace, in and for the County of Colchester, charging plaintiff with obtaining from him a suit of clothes for one W., under the false pretence that she would pay for the same the following week. The information having been sworn to, J. issued a warrant, under which plaintiff was arrested. In an action brought by plaintiff claiming damages for false arrest, the trial judge gave judgment in favor of the defendant J., (the action against M. having been abandoned), on the ground that the notice of action given under R.S. c. 104, was defective, on account of failure to state the place at which the offence was committed:—Held, per Ritchie, J. (McDonald, C.J., concurring), that the representation that plaintiff would pay for the clothes the following week, was not the representation of a fact either past or present within the meaning of the code. Also, that as the information did not allege that plaintiff had been guilty of any crime, the arrest was illegal and made without any authority. Also, that the older cases as to notice to a justice have been modified by more recent decisions, and the test now is, whether or not the magistrate *bona fide* believes in the existence of facts, which, if they existed, would give him jurisdiction. Also, that admitting that the magistrate, in the present case, was acting *bona fide*, and believed he had jurisdiction, no circumstances were brought to his notice, which, if true, would give him jurisdiction, and his belief on the subject was without ground on which it could be based and was unreasonable. Per Henry, J. (Graham, E.J. concurring,) affirming the judgment appealed from; Held, that the justice having acted with some color of reason, and with a *bona fide* belief that he was acting in pursuance of his legal authority, he was entitled to protection, although he may have proceeded illegally or in excess of his jurisdiction. *Mott* v. *Milne*, 31 N.S.R. 372.

—Wounding with intent—Preliminary enquiry —Reducing charge to assault.]—Justices of the Peace have no jurisdiction to summarily convict for "assault," when the only information before them is for an offence beyond their summary jurisdiction.—On a charge of shooting and wounding with intent, the justices holding a preliminary enquiry cannot, of their own motion, vary or reduce the charge to one of common assault and so acquire jurisdiction to adjudicate thereupon. *Miller* v. *Lea*, 2 Can. Cr. Cas. 282, 25 Ont. App. 428.

And see Criminal Law, XVI.

VII. Preliminary Hearing.

—Reducing charge from "wounding" to "assault."]—Justices of the Peace have no power on a preliminary investigation before them of a charge of unlawfully wounding, to reduce the charge to one of common assault, over which they would have summary jurisdiction.—A conviction recorded by justices in such a case upon a plea of guilty to the charge as reduced, is not a bar to an indictment for unlawfully wounding, based upon the same state of facts, and does not support a plea of *autrefois convict*. *The Queen* v. *Lee*, 2 Can. Cr. Cas. 233.

—Enquiry commenced by one and completed by two—Invalid commitment.]—Where evidence on a preliminary enquiry is commenced before one Justice of the Peace, and finished before two justices, a committal by the two is irregular unless both have heard all the evidence. *Re Nunn*, 2 Can. Cr. Cas. 429.

VIII. Review by Certiorari.

—Merchants' Shipping Act—Seaman's wages—Jurisdiction—Final judgment.]—*Quære*—Where the Merchants' Shipping Act of 1854 provides that every order of two justices in an action for seaman's wages shall be final, will *certiorari* lie to remove the proceedings into a Superior Court? *The Queen* v. *Sailing Ship "Troop" Co.*, 29 S.C.R. 662.

IX. Warrants.

—Police Magistrate—Justice of the Peace acting in place of—Warrants—Wrong designation.]—A Justice of the Peace acting in the illness or absence or at the request of a Police Magistrate, should be designated as so acting in warrants or other process, otherwise the latter will be invalid.—A warrant signed by a Justice of the Peace so acting, in which he is described as "Police Magistrate," is void. —The initials "J.P." following the signature of the person presuming to issue a warrant is not a sufficient description of such person as a Justice of the Peace for the city or county in which the warrant purports to have been issued. *The Queen* v. *Lyons*, 2 Can. Cr. Cas. 218.

—Justice's warrant of commitment.]

See Criminal Law, XVI.

LAND.

See Trespass to Land.

LANDLORD AND TENANT.

I. Abandonment of Premises.

—Fire in leased premises—Repairs.]—Damage by fire so inconsiderable in extent that repairs may be made in three or four days does not justify the lessee in abandoning the premises. His remedy is to put the lessor in default to make the necessary repairs, and then, if the repairs be not made, to ask for the cancellation of the lease. *Liggett* v. *Viau*, 14 Que. S.C. 396.

—Abandonment in case of urgency—Demand for resiliation—Reduction in rent.]—A tenant cannot abandon the premises under lease except in case of urgency, and even then he should demand the resiliation of the lease.—In this case the tenants could, at most, claim that the rent should be reduced. *Cautin* v. *Belleau*, 15 Que. S.C. 286.

II. Conditions and Covenants.

—Covenant for renewal—Compensation for improvements—Time for election.]—Where a covenant in a lease to the effect that if, on the expiration of the term, the lessee should be desirous of taking a renewal lease, and should have given to the lessors thirty days' notice in writing of this desire, the lessors would renew at a rental to be fixed as therein directed, went on to provide that if the lessors did not see fit to renew, the lessee should receive compensation for his permanent improvements:—Held, that in order to entitle the lessee to claim compensation for his improvements and refuse to accept a renewal lease, the lessors must have elected before the expiration of the existing term not to renew; and if they did not so elect, the lessee was bound to accept a renewal lease if and when required so to do. *Ward* v. *City of Toronto*, 29 Ont. R. 729, affirmed 26 Ont. App. 225.

III. Damage to Premises.

—Premises vacated by lessee during lease—Subsequent damage.]—Where the lessee vacated the premises during the term of the lease, and informed the lessor of the fact, but added that precautions had been taken by him to have the water turned off and the gas meter removed, and the lessor, relying on this notice, did not take any steps to protect the premises, and great damage occurred from frozen water pipes, the lessee, having misled the lessor, is responsible for such damage. *Burland* v. *Munyon's Remedy Co.*, 14 Que. S.C. 411.

IV. Distress.

—Delay in sale—Distress left on demised premises—Bond by tenant—Abandonment—Goods in custodiâ legis.]—Delay in the sale of goods distrained for rent does not prejudice the distress, if there is no fraud or collusion between the landlord and tenant to defeat the rights of third parties. Where the goods seized are left by the landlord's bailiff upon the demised premises, in the possession of the tenant, the taking of a bond from the tenant to the bailiff to produce and keep and deliver the chattels and crops, and not to remove or allow them to be removed from the premises, and to hold them for the bailiff, is not evidence of an abandonment of the seizure, but the contrary. Pending the distress, the goods taken are in the custody of the law, and not liable to seizure under a chattel mortgage, so long as no fraud is on foot and no intention or contrivance exists to prejudice the mortgagee: *McIntyre* v. *Stata*, 4 U.C.C.P. 248; *Roe* v. *Roper*, 23 U.C.C.P. 76; *Whimsell* v. *Giffard*, 3 Ont. R. 1, and *Langtry* v. *Clark*, 27 Ont. R. 280, distinguished; *Anderson* v. *Henry*, 29 Ont. R. 719.

V. Duration of Tenancy.

—Lease for 11 months—Monthly or yearly tenancy—Overholding.]—R. & Co. made the following offer in writing to the owner of the premises mentioned therein:—"We are prepared to rent that store where the 'Herald' offices used to be and will give $400 a year for the whole of the ground floor as well as the cellar. We will rent for 11 months from the 1st of August next at the rate of $400 per year." . . . This offer having been accepted R. & Co. occupied the premises for a year and seven months, no new agreement being made after the 11 months expired, paying their rent monthly during said period. They then gave a month's notice and quitted the premises. The landlord, claiming that the tenancy was from year to year brought an action for rent for the two months after the tenancy ceased according to the notice:—Held, that the tenancy was one from month to month after the original term ended and the month's notice to quit was sufficient. *Eastman* v. *Richard & Co.*, 29 S.C.R. 438.

—Verbal lease—Rent at so much a month—Art. 1642 C.C.]—The lease of a house, when no time is specified for its duration, is presumed to be by the month when the rent is at so much a month (Art. 1642 C.C.) and in the present case this presumption of law had not been rebutted by proof of a positive, universal and acknowledged usage to the contrary. *Corbeil* v. *Marleau*, 14 Que. S.C. 201.

VI. Ejectment.

—Parties to action—Sub-tenants.]—In an action by a landlord for possession of the premises, it is not necessary to make sub-tenants in actual possession parties defendant, and a

judgment for possession may be given against the tenant under which the sub-tenants must go out. *Synod of Toronto* v. *Fisken*, 29 Ont. R. 738.

VII. Lease.

—Title to land—Mistake—Lessor and lessee—Estoppel.]—Where a person is in possession of land under a good title, but, through the mutual mistake of himself and another person claiming title thereto, he accepts a lease from the latter of the lands in dispute, he is not thereby estopped from setting up his own title in an action by the lessor to obtain possession of the land. In such a case the Crown being the lessor is in no better position in respect of the doctrine of estoppel than a subject. *The Queen* v. *Hall*, 6 Can. Ex. C.R. 145.

—Term of years—Provision for sale of land—Illegal entry by purchaser—Trespass—Incoming tenant.]—In a lease of a farm for five years, containing a covenant by the lessor for quiet enjoyment, the lessee agreed that if the place were sold, and he should receive one month's notice prior to the expiration of any year, he would give up peaceable possession and allow any incoming tenant to plough the land after harvest. Before the expiration of the lease the place was sold and conveyed to a purchaser and an assignment of the lease made to him. In the fall of the year, after the purchase, and before the lessee had harvested his crop, the purchaser entered on the land and ploughed it up thereby causing injury to the lessee:—Held, that the purchaser was a "tenant" within the meaning of the covenant as to an incoming tenant, but that he had no right to enter on the property before the plaintiff had harvested his crop, and was a trespasser and liable for damages caused thereby; Held, also, that no liability was imposed on the lessor under the covenant for quiet enjoyment. *Newell* v. *Magee*, 30 Ont. R. 550.

—Agreement for sale of land—Terms of payment—Interest payable as rent.]—P. had agreed to sell an immovable to R. for $1,000, of which $50 was paid. The remaining $950 was made payable in 19 years by instalments of $25 every six months with interest at 6%. P. agreed to execute a formal deed of sale when $500 had been paid to him, but if R. should make default in two of the $25 payments he should lose all rights under the agreement and to repayment of what he had paid. By the same instrument P. professed to lease the immovable to R. for ten years with an annual rent of $57 (which represented the interest at 6% of $950), which was to be reduced in proportion to the amounts paid on the purchase price of the land:—Held, that this instrument did not constitute a lease and P. could not proceed against R. by way of *saisie-gagerie*. *Picaud* v. *Renaud*, 15 Que. S.C. 358.

VIII. Lease of Mortgaged Premises.

—Notice by mortgagee to tenant to pay rent—C.S.N.B. c. 83, s. 15—Revocation of notice—Rent due before revocation.]

See Mortgage, XII.

IX. Liability of Lessee.

—Fire in leased premises—Repairs—Seizure in recaption—Art. 1623 C.C.] — Held, where a lease contains stipulations to the effect that the lessee shall deliver the premises at the expiration of the lease in as good order as they were in at the commencement of the lease, reasonable wear and tear and accidents by fire excepted, and shall pay extra premium of insurance exacted by insurance company in consequence of the work carried on by the lessee, the effect is to do away with the presumption, which would otherwise exist by law in favour of the lessor, that the fire which occurred in the leased premises was due to the fault of the lessee, or of persons for whom he was responsible, and it is for the lessor to prove fault before he can recover damages.—Damage by fire so inconsiderable in extent that repairs may be made in three or four days does not justify the lessee in abandoning the premises. His remedy is to put the lessor in default to make the necessary repairs, and then, if the repairs be not made, to ask for the cancellation of the lease.—The lessor is not entitled to seize in recaption merchandize bought from the lessee in good faith, even though said merchandize constitute an entire stock and be sold *en bloc*. Art. 1623 C.C. *Liggett* v. *Viau*, 14 Que. S.C. 396.

—Taxes of former years—Liability of tenant—R.S.O. c. 224, s. 26.]

See Assessment and Taxes, VII.

X. Overholding Tenant.

—Creation of new term—Delivery of keys—Continued occupation of part of premises—Evidence of value.]—Upon the expiry of a parol lease for a term certain, with an option in the lessees to renew for a fixed period, the facts that the keys of the demised premises were not delivered by the lessees to the lessor for two or three days after the expiry of the term, and that a sub-tenant of the lessees continued thereafter in possession of a portion of the premises, are not sufficient to constitute an exercise by the lessees of their option to renew. Such possession of the sub-tenant is, however, sufficient to make the lessees liable for use and occupation, as to which the rent payable under the lease which has expired may be some evidence of the value of the premises, although no particular contract is to be inferred from the mere fact of holding over. *Lindsay* v. *Robertson*, 30 Ont. R. 229.

XI. PRIVILEGE OF LESSOR.

—Lessor and lessee—Saisie-gagerie par droit de suite—Intention of lessee to remove effects from leased premises.]—The landlord's privilege of *saisie-gagerie par droit de suite* against the tenant does not exist where the latter has not removed any effects garnishing the leased premises, but is only contemplating such removal. *Chassé* v. *Desmarteau*, 14 Que. S.C. 65.

—Lease of movables—Conditions—Removal.]—An agreement in a lease of furniture that on default of payment of rent it would be lawful for the lessor to remove it without legal proceedings, does not authorize the latter, when the lessee objects, to take the law into his own hands and remove the furniture by force, but he is bound in such case to submit to the usual formalities of revendication by law. *Gagnon* v. *Viau*, 14 Que. S.C. 429.

—Detention of tenant's goods—Saisie-gagerie.]—The landlord cannot detain his tenant's effects by force, but should exercise his privilege by way of *saisie-gagerie*. *Catholic Order of Foresters* v. *St. Martin*, 15 Que. S.C. 30.

—Rights of lessor as to moneys representing loss by fire of effects garnishing premises.]—The lessor has no privilege for rent on the moneys in the hands of an insurance company, representing the loss by fire of effects garnishing the premises leased. *Vaughan* v. *Pelletier*, 15 Que. S.C. 123.

—Property of tenant—Liability to distress—Sub-tenancy.]—However short a tenancy may be the effects of the tenant and whatever he has brought into the premises for the purposes of his tenancy guarantee the payment of the rent and are affected by the privilege of the landlord so long as they are on the premises.—A *bon* given by the tenant in payment of the rent or a part of it does not alter the character of his debt and does not release his movables from the privilege affecting them in favor of the landlord.—A sub-tenant being bound to the principal tenant up to the amount of his sub-tenancy so long as the sub-tenant's rent remains due the effects guaranteeing his payment remain affected so long as they are not removed from the premises underlet. *Allard* v. *Charlebois*, 15 Que. S.C. 517.

XII. RENT.

—Bankruptcy and insolvency—Landlord and tenant—Rent—Acceleration clause—"Current quarter"—58 V., c. 26, s. 3., s.s. 1 (Ont.).]—*Langley* v. *Meir*, 25 Ont. App. 372, *ante* 44.

—Assignment for benefit of creditors—Future rent—Preferential lien—Distress—R.S.O. c. 170, s. 34.]—*Lazier* v. *Henderson*, 29 Ont. R. 673, *ante* 45.

—Assignment for the benefit of creditors—Future rent—Preferential lien—Acceleration clause—R.S.O. c. 170, s. 34.]—A lease, under which the rent was payable quarterly in advance, contained a provision that if the lessee should make an assignment for the benefit of creditors, the then current and next ensuing quarter's rent and the current year's taxes should immediately become due and payable as rent in arrear, and recoverable as such:—Held, on the lessee making such an assignment, that the lessor was entitled to recover by distress and had a preferential lien for—in addition to a quarter's rent due and in arrear for the quarter preceding the making of the assignment—the rent of the current quarter in which the assignment was made, which was also due and in arrear, as well as a further quarter's rent, together with the taxes for the current year. *Langley* v. *Meir*, 25 Ont. A.R. 372, commented on; *Lazier* v. *Henderson*, 29 Ont. R. 673, followed. *Tew* v. *Toronto Savings and Loan Co.*, 30 Ont. R. 76.

—Contract—Lease—Proof against authentic lease—Commencement of proof in writing.—Where the lessee during nearly three years paid rent at the rate of $29 per month, and accepted receipts for the money paid as said rental, such receipts, as well as the admissions of defendant, constituted a commencement of proof in writing to contradict the terms of the authentic lease by which the rent was declared to be $15 per month, and the evidence of the lessor was sufficient to complete the proof. *Beauchamp* v. *Beauchamp*, 14 Que. S.C. 427.

—Payment by lodging landlord—Compensation—Rights of landlord's creditors—Tiers-saisie.]

See DEBTOR AND CREDITOR, VII.

XIII. RESILIATION OF LEASE.

—Action for rent—Saisie-gagerie—Conclusions for resiliation—Confession for rent due—Judgment.]—When a defendant, sued for rent due and accruing due with *saisie-gagerie*, and conclusions demanding resiliation of the lease, has confessed judgment for the amount of the rent due, the prothonotary cannot, upon such confession, maintain the seizure and give judgment for the resiliation. *Boulrice* v. *Rhéaume*, 15 Que. S.C. 20.

—Sub-lease—Verbal permission—Change of business—Arts. 1624, 1638 C.C.—Art. 400 C.C.P.]

See hereunder, XV.

XIV. RESPONSIBILITY OF LESSEE.

—Lessee with agreement for purchase—Work on land—Servitude on adjoining property—Aggravation—Art. 501 C.C.]—See ACTION, V.

XV. SUB-LETTING.

—Consent of lessor—Verbal permission—Change of business—Arts. 1624, 1638 C.C.—Art. 400 C.C.P.]—Notwithstanding a lease prohibits

the sub-letting of the premises without the permission in writing of the lessor, it is sufficient for the lessee to prove that the lessor verbally authorized the sub-lease to avoid a resiliation of the lease on that ground: *Cordner* v. *Mitchell*, 1 L.C.L.J. 58, followed.—The fact that the lessee sub-let, for the purposes of a warehouse, premises leased to him in order to carry on a business in fancy goods, especially when the premises have been injured by reason of the weight of the warehoused goods, is ground for the resiliation of the lease. *Prévost* v. *Holland*, 15 Que. S.C. 298.

XVI. Tenant's Unauthorized Acts.

—Easement—Right of way—Prescription—Acknowledgment by tenant.]—After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription the tenant of the dominant tenement without the knowledge of the owner gave to the tenant of the servient tenement two pairs of shoes as consideration for the exercise of the right:—Held, that even if an act of this kind could in any event affect the right that had been acquired the owner of the dominant tenement was not bound by what the tenant did without his authority. *Ker* v. *Little*, 25 Ont. App. 387.

XVII. Validity of Lease.

—Lease—Illegal consideration—Proposed monopoly.]—The plaintiffs leased their rope factory to the defendant for a period of twenty-one years. In answer to an action for rent due under the lease, the defendant pleaded that the lease was passed in order to create a monopoly in the cordage, rope and twine business, and that the consideration being illegal, the lease was null:—Held, that the plaintiffs not being parties to the proposed monopoly, but being merely in the position of lessors leasing their factory in good faith, and selling the good will of their business, their rights under the lease were not affected by the lessee's intentions. *Bannerman* v. *Consumers' Cordage Co.*, 14 Que. S.C. 75.

LARCENY.

See Criminal Law, XXII.

LAW STAMPS.

—Law Stamp Act, C.S.B.C. 1888, c. 70—Unstamped summons—Power of Court to affix stamp after judgment — "Knowingly and wilfully" violating Act.]

See Practice and Procedure, LXII.

LEGAL MAXIMS.

—Nemo plus juris transferee potest quam ipse habet.]—See *Guerin* v. *Manchester Assurance Co.*, 29 S.C.R. 159.

—Qui prior est tempore potior est jure.]—See *King* v. *Keith*, 1 N.B. Eq. 538.

—"Sic utere tuo ut alienium non lœdas."]—See *McBryan* v. *Canadian Pacific Ry. Co.*, 29 S.C.R. 359.

—Verba chartarum fortius accipiantur contra proferentem.]—See *Employers Liability Insurance Corporation* v. *Taylor*, 29 S.C.R. 104.

—Volenti non fit injuria.]—See *Price* v. *Roy*, 29 S.C.R. 494.

LIBEL AND SLANDER.

I. Damages.

—Slander—Exemplary damages.]—In an action to recover damages for slander the Court will award exemplary damages although the plaintiff may not have proved specific damage, if the verbal injuries have been made with persistence and in a manner to cause vaxation to the plaintiff. *Chalin* v. *Gagnon*, 5 Rev. de Jur. 320.

II. Newspaper Libel.

—Defamation—Libel—Newspaper—Fair comment.]—*Douglas* v. *Stephenson*, 26 Ont. App. 26, affirming 29 Ont. R. 616 and C.A.Dig. (1898) 249.

III. Practice and Procedure.

—Particulars—Places and dates—Witnesses.]—In an action for damages for slander the plaintiff may be compelled to give particulars of the places where and the dates on which the defamatory words were spoken, but not of the names of the persons before whom they were spoken. *Roy* v. *Powell*, 2 Que. P.R. 27.

—Action between traders—Particulars.]—In an action between traders for slander the plaintiff is bound, on pain of dismissal of his action, to furnish particulars of the persons to whom the defamatory words were spoken as well as the dates. *Coallier* v. *Filiatrault*, 2 Que. P.R. 33.

—Judgment for slander (injures verbales)—Amount of damages—Contrainte par corps—New Code of Procedure—Art. 833 C.C.P.—Art. 2272 C.C.]—See Practice and Procedure, XV.

IV. Privilege.

—Privilege—Protection of interests—Excessive language.]—The defendant received a letter from the solicitor of the plaintiff's mother complaining of statements circulated by the defendant which had caused the mother and her family, and particularly her daughter, the plaintiff, annoyance, and threatening to begin an action for slander unless a retractation were signed and costs paid. This letter was not answered by the defendant, but the threatened action having been brought, the defendant wrote a letter to the plaintiff's

mother with the avowed purpose of preventing her from proceeding with her action. In that letter he referred to the plaintiff, and said he saw her drive her father out of the house and pelt him with sticks of wood, and asked the mother if she thought it would add to her daughter's character to have this and much more published in Court and in newspapers.—Held, in an action for libel based upon this letter, that it did not come within the rule as to "statements necessary to protect the defendant's interests," so as to make the occasion privileged; and even if it did, the privilege was destroyed by the excess of the language. *Benner* v. *Edmonds*, 30 Ont. R. 676.

—Slander—Privileged communication—Evidence of malice.]—A plea of privilege is no defence to an action for slander if it be shewn that the defendant acted without probable cause and with malice.—The presumption of absence of malice, which might exist, to relieve a defendant from responsibility for statements made on a privileged occasion, would be rebutted by proof of recklessness in making the statements, particularly when such proof is supported by defendant's having made similar statements on other occasions. *Boydell* v. *Morrow*, 15 Que. S.C. 191.

— Slander — Privileged communication — False statement.]— The defence of confidential or privileged communication, made under a pledge of secrecy, to a person who intended to marry the plaintiff, and inquired of defendant as to her character, cannot avail the defendant where it appears that he had previously made statements affecting the plaintiff's character in the hearing of other persons, and thereby brought about the position which he invoked as excusing him; the Court, moreover, being of opinion that the evidence shewed the statements to be false. *Bélair* v. *Chaussé*, 15 Que. S.C. 512.

—Slander—Publication—Words in presence of accused.]—Words charging the offence of adultery uttered in the presence of the accused persons constitute a privileged communication, and the privilege is not lost by the fact that the words might have been overheard by third persons, in the absence of evidence that the words were overheard by them. *Gorman* v. *Urquhart*, 34 N.B.R. 322.

—Slander—Malice—Questions for jury—Aggravation of damages.]—Plaintiff, an infant under the age of 21 years, sued by her next friend, claiming damages from defendant for falsely and maliciously speaking and publishing of the plaintiff, certain words, accusing her of stealing a sum of money from the till of the defendant's shop. The words complained of were spoken in the first instance to the plaintiff herself, and were in the next place repeated to the plaintiff's father and mother, who came with her to the defendant asking for particulars.—Held, setting aside the verdict for plaintiff with costs, and ordering a new trial, in the absence of other evidence of publication, that the trial Judge erred in failing to direct the jury that the occasion was a privileged one, and that they could find for the plaintiff only if they came to the conclusion, from the evidence submitted, that defendant was not acting *bonâ fide*, but was influenced by malice or spite, which could not, in a case like this, be inferred from the mere publication of the defamatory words. *Johnston* v. *Kidston*, 31 N.S.R. 283.

V. Publication.

— Evidence — Admissibility — Publication — Verdict.]—Evidence was given by a woman who said that she saw the defendant's letter in the hands of the plaintiff's mother within twenty minutes after its receipt, and that she read it aloud in the presence of the plaintiff and her mother and several other persons. There was also evidence to shew that the letter had been posted and given out by the post-master to the plaintiff's mother:—Held, that had the evidence of the woman been offered in order to fix the defendant with liability for what was done as a further publication of the letter, it would not have been admissible, but it was admissible in order to prove publication by the defendant, which was denied, as it shewed that the letter was in the possession of the person to whom it was addressed shortly after it was posted by the defendant, and therefore was evidence of the receipt of it by her. It may not have been necessary to give the evidence, but the plaintiff had the right to do so:—Held, also, that it was not a ground for interfering with the verdict of the jury in favour of the plaintiff, that the trial Judge refused to tell the jury that the defendant was not responsible for the further publication of the letter made by the plaintiff or her mother, the jury not having been invited to increase the damages by reason of publication to others, and the damages awarded not being excessive. *Benner* v. *Edmonds*, 30 Ont. R. 676.

—Private letter—Defamation.]—A private letter containing defamatory matter addressed to a person who does not make public the contents is not the less a ground for an action for damages even if it has not been published. *Peters* v. *Tardivel*, 15 Que. S.C. 401.

—Evidence of motive tendered and refused—New trial ordered.]—In an action brought against defendant, one of the general agents of the Confederation Life Association, for publishing to a policy holder in the company, certain alleged libellous matter, of and concerning plaintiff, formerly local agent for the company at B., and who had been removed from his position by defendant, counsel for defendant tendered evidence at the trial to shew the motive of defendant in writing the letter complained of. The trial Judge having refused to receive the evidence:—Held,

that he was wrong in so doing and that there must be a new trial. *Miller* v. *Green*, 32 N.S.R. 129.

VI. Slander of Married Woman.

—Authority to sue—Personal wrongs—Arts. 176, 183 C.C.]—See Husband and Wife, XI.

LICENSE.

See Liquor License.

" Municipal Corporations, XIII.

LICITATION.

—Licitation judiciaire—Collocation—Improvements and repairs—Right of detention.]

See Sales of Lands, IV.

LIEN.

I. Builder's Lien.

—Art. 2013b C.C.—59 V., c. 42 (P.Q.)—Privilege registered under amending statute—Privilege for materials supplied.]—Where a privilege, both by the law as it previously existed and by the amending Act, is made to depend upon and date from its registration, the effects of the registration of such privilege, after the coming into force of the amending statute, are governed by the provisions thereof. Therefore, the prescription applicable to a builder's privilege, registered after the coming into force of the amending statute, 59 V., c. 42 (P.Q.), is that of one year from the date of the registration.—The fact that subsequently to the registration of a builder's privilege the person registering the same accepted notes for his claim from the debtor, and agreed to have the same renewed for a term of three years, has not the effect of altering the conditions of the privilege or of prolonging its existence beyond the period fixed by law.—In order to obtain the hypothecary privilege of a supplier of materials under 2003*b* C.C., the memorial or *bordereau* registered must state the cost of the materials furnished apart from the cost of the work done. *City of Montreal* v. *Lefebvre*, 14 Que. S.C. 473.

And see hereunder, Mechanic's Lien.

II. Hotelkeeper's Lien.

—Theft—Goods under seizure—Hotelkeeper—Lien for board—Lawful seizure and detention.]

See Criminal Law, XXII.

III. Lumberman's Lien.

—Right of retention—Driving, booming, sorting and rafting of logs—Privilege by bank.]—A person who, under a contract with the owner, then in ostensible possession, performs work in driving, booming, sorting and rafting manufactured logs, brings them nearer to the market for them, and thereby adds materially to their commercial value, has a right of retention for the price of his services, and his privilege therefor has precedence of the claim of the bank, pledgee, for advances made on the logs prior to the performance of the work of driving, etc. The person who does such work of driving, booming, sorting and rafting, does not lose his privilege by accepting promissory notes for the price, which notes have not been paid, and which he brings into Court with his action. The Statute, 57 V. (Quebec), c. 47, does not affect the rights of such person. The right of retention exists only for the work done under contract during the current season, and not for work done under another contract, and on other timber, during a previous season. *Bank of Ottawa* v. *Bingham*, 8 Que. Q.B. 359.

IV. Maritime Lien.

—Saisie-arrêt of schooner—Latest equipment—Action in rem.]—A creditor for advances to the owners of a schooner cannot, by reason of such debt, exercise the privilege of *dernier équipeur* and cause the schooner to be sold as against a mortgagee; he should proceed before the Admiralty Court by action *in rem*. *Gagnon* v. *Tremblay*, 15 Que. S.C. 403.

—Seaman's wages—Lien for—Action in rem.]

See Shipping, XIII.

V. Mechanic's Lien.

—Sufficiency of affidavit—Labor and materials.]—In an affidavit for a mechanic's lien, the particulars of the claim as stated were "the putting in bath tubs, wash tubs, hot and cold water connections, all necessary pipes, boiler and hot water furnace, and waste pipes, $220.00." Forin, Co. J., at the trial, refused a motion for a nonsuit, and referred it to the Registrar to ascertain how much of the claim was for labour, and directed judgment to be entered for the plaintiff for that amount:—Held, by the Full Court, on appeal, per McColl and Drake, JJ., (Davie, C.J., dissenting), that the particulars of the claim were insufficiently stated, under s. 8 of the Mechanics' Lien Act, 1891, and also that the claim could not be supported as including, indiscriminately with the claim for labour, a claim for materials, as to which there is no lien. Per Davie, C.J., that the particulars and affidavit were sufficient, and that the separation of the price of the labour from that of the material was a function of the Court exercisable at the trial. *Weller* v. *Shupe*, 6 B.C.R. 58.

—Miner's lien for work on mineral claim.]—Under the Mechanics' Lien Act a free miner may enforce a mechanic's lien against a mineral claim. A statement in the affidavit of lien that the work was finished or discontinued on or about a certain date is sufficient.

Holden v. *Bright Prospects Gold and Development Co.*, 6 B.C.R. 439.

—Validity of claim of lien—Affidavit—Commissioner—Solicitor.]—In a proceeding for the purpose of realizing a mechanics' lien, objection was taken to the validity of the lien, upon the ground that the affidavit attached to the claim of lien filed, was sworn before one Morrison, who was now the plaintiff's solicitor. Held, that the objection was not entitled to prevail. *Vernon* v. *Cooke*, 49 L.J.C.P. 767, followed. *Baker* v. *Ambrose*, [1896], 2 Q.B. 372, distinguished. [Bole, Co. J.] *Elliott* v. *McCallum*, 19 C.L.T. (Occ. N.) 412. And see hereunder, IX.

VI. MORTGAGEE'S LIEN.

—Security for costs—Ejectment claim for improvements—Mesne profits—Mortgage.]

See COSTS, XVI.

VII. SOLICITOR'S LIEN.

—Attaching order—Priorities—Waiver of lien.]—The lien of a solicitor upon a verdict recovered for his client will prevail against an attaching order obtained by a creditor of the client. *Shippey* v. *Grey* (1880), 28 W.R. 877, followed. But in the circumstances of this case, where the defendant had paid over to an attaching creditor of the plaintiff the amount of the verdict recovered by the plaintiff, under the full belief that he was obliged to do so, and that the plaintiff's solicitors had no right to prevent the attaching creditor from recovering the money, and the solicitors, being aware of the existence of the attaching order, had conduced to this belief by their neglect to enforce their rights, they were not allowed to claim payment over again from the defendant. *Berneski* v. *Tourangeau*, 18 Ont. Pr. 263.

—Solicitor's lien for costs — Protection against attaching creditor.]—See SOLICITOR.

—Settlement of action—Unpaid costs.]

See SOLICITOR.

VIII. TAX LIEN.

—Municipal law—Lien for taxes—Discharge by sale—Release.]

See ASSESSMENT AND TAXES, XIII.

IX. WORKMAN'S LIEN.

—Logs cut for contractor—Notice to principal—Notice to contractor—Contract for winter season—Art. 1994 c. C.C.—Arts. 192, 919, 945, 956 C.C.P.; 57 V., c. 47 (P.Q.).]—Although Art. 1994 *c.* C.C. for the conservation of a workman's privilege on timber got out by him for a contractor, requires notice to be given "as soon as possible," he will not lose his privilege where he has allowed eleven days to expire between completion of working and giving of notice, provided that there is no want of diligence on the part of the workman and no prejudice caused to the other parties by the lapse of time. In such case the workman does not lose his privilege, even if he has given no notice to the debtor, when it has been impossible to do so on account of the debtor having absconded; and the person affected by the exercise of the privilege, and who has received a notice, cannot plead want of notice to the debtor, particularly when the debtor's books establish the existence of the debt, the primary object of the notice to the debtor being to give him an opportunity to contest the amount due.—Although Art. 1994*c*. C.C. requires notice "at each term of payment" a single notice at termination of winter season is sufficient, if it be shewn that the workman was engaged for the whole winter season and was not to be paid monthly notwithstanding that the wages were fixed at a rate of so much per month. *Daviau* v. *Hawthorn*, 14 Que. S.C. 500.

And see hereunder, MECHANIC'S LIEN.

LIEN NOTE.

—Promissory note for price of machinery—Conditions.]

See BILLS OF EXCHANGE AND PROMISSORY NOTES, V.

LIMITATION OF ACTIONS.

I. ADVERSE POSSESSION.

—Easement—Right of way—Acknowledgement by tenant—Prescription.

See LANDLORD AND TENANT, XVI.
" WAY.

II. BAR TO PLEA OF PRESCRIPTION.

—Title to land—Substitution—Bonâ fides—Recital in deed—Presumption against purchaser—Arts. 930, 2191, 2193, 2202, 2207, 2251, 2253 C.C.]—As good faith is required for the ten years prescription under the Civil Code, that prescription cannot be invoked against a substitution which has been duly registered such registration being sufficient to constitute any third party, who might subsequently purchase from the institute, a holder in bad faith.—Where the title deed of a purchaser of lands bears upon its face recitals which would have led upon inquiry to evidence of the defeasibility of his vendor's title, he

must be presumed to have been aware of the precarious nature of the title he was purchasing and prescriptive title cannot afterwards be invoked either by him or those in possession under him as holders in good faith under translatory title. *Meloche* v. *Simpson*, 29 S.C.R. 375.

III. Commencement of Prescription.

—Prescription—Action for bodily injuries—When prescription begins to run—Art. 2262 C.C.]—The prescription applicable to actions for bodily injuries under Art. 2262 C.C. begins to run from the date of the offence or quasi-offence which caused the injuries complained of. The fact that the person who was injured continued to suffer damage in consequence of the injuries received has not the effect of preventing prescription from beginning and continuing to run from and after the time when the cause which produced the injury ceased to operate. *Lavoie* v. *Beaudoin*, 14 Que. S.C. 252.

—Partition of land—Plea of Statute of Limitations — Possession — Recovery in ejectment — "Rent"—R.S., 5th series, c. 112, s. 17.]—On an application for the partition of land, it appeared that the land in question was purchased in 1839 by A. and H. jointly, the deed giving to each of them a one-half interest. In 1861, A., who had never been in actual possession of any portion of the land, left the province, and did not return; but in 1868 judgment in ejectment was recovered in the names of both A. and H. against one M., who was then in possession. In 1840, shortly after the purchase, G. H., a son of H., went into possession of a small portion of the land, about five acres, and continued in possession for some five years, after which he removed to the West Indies, where he died. After the death of G. H., the defendant, J. A. H., leased the same portion of the land to one M., who paid no rent, but paid taxes and made some improvements. After M. ceased to occupy, W. H., another son of H., went into possession of the same portion, and continued to occupy down to the commencement of the proceedings for the partition. In 1890, plaintiff, who represented the share of A., without objection from any of the other parties interested, and with the knowledge of J. A. H., was awarded one-half of the amount paid by the Government in connection with the expropriation of a portion of the land for public purposes. The application made by plaintiff was not opposed by any of the heirs of H., with the exception of J. A. H., who set up the Statute of Limitations, and G. A. V., who failed to shew possession of any kind:—Held (McDonald, C.J., dissenting), that no such exclusive possession or enjoyment of the land had been shewn as would entitle the defendants to set up the statute in bar of the plaintiff's claim. Held, also, that in order to avail themselves of the statute, defendants must have been in the actual exclusive possession of the land held in common, or in the actual receipt of the entirety, or more than their share of the rents and profits of the land for the statutable period. Held, also, that the statute could not, in any case, commence to run from an earlier period than the recovery in ejectment in 1868. Held, also, that the defendant, J. A. H., could not avail himself of a defence, on the ground of exclusive occupation, possibly open to another defendant, W. H., of which such other defendant declined to take advantage. Held, also, that the word "rent" within the meaning of the statute, R.S., 5th series, c. 112, s. 17, refers to actual rent, and not to improvements made in lieu of rent, which would enure equally to the benefit of all interested. *Quære*, whether a petition for partition is an "action for the recovery of land or rent" to which the statute will apply. *Archibald* v. *Handley*, 32 N.S.R. 1.

—Executors—Fraud by solicitor of—Negligence —Defence of Statute of Limitations.]

See Executors and Administrators, VII.

—Equitable estate—Assignment of interest in land—Right to possession—Subsequent mortgage —Notice.]—See Equitable Estate.

IV. Future Estate.

—Claim to realty—Deed of appointment—Accrual of right.]—On the 25th of October, 1870, the plaintiffs' testator purchased certain lands and procured a deed to be made to the grantees named therein to hold to such uses as he should by deed or will appoint, and in default of such appointment, and, so far as such appointment should not extend, to the use of the said grantees, their heirs and assigns. He put his mother in possession of the land, and she so continued up to the time of her death, which occurred on the 21st July, 1878, the defendants, her two daughters, residing with her, and after her death continuing to reside on the land, and remaining in possession until action brought. On 1st November, 1892, the plaintiffs' testator in the alleged exercise of the power of appointment, executed a deed appointing and conveying the lands to another person who then reconveyed to him. He subsequently died, having devised the property to the plaintiffs, and on the 19th March, 1897, an action to recover possession was brought by them:—Held, that the effect of the deed of the 25th October, 1870, was to vest the fee simple in the lands in the grantees to uses subject to be divested on the exercise of the power of appointment, and that the deed of 1st November, 1892, was a due execution thereof; that the testator's estate, prior to the appointment, was a future estate or interest within the meaning of s. 5, s.s. 11, of the Real Property Limitation Act, R.S.O. (1897), c. 133, which came into possession on the execution of the deed of 1st November,

1892, and that plaintiffs not being barred by effluxion of time were entitled to recover. *Thuresson* v. *Thuresson*, 30 Ont. R. 504.

V. Interruption of Prescription.

—Mortgage—Arrears of interest—Acknowledgment.]—Upon the sale of a property which was subject to mortgage the purchaser and the mortgagor inquired from the mortgagee the amount due, and the mortgagee signed a memo., endorsed upon the mortgage, fixing the amount claimed by him. The deed to the purchaser was made subject to the mortgage, upon which there was stated to be due the amount claimed, and contained a covenant by the purchaser to pay the amount and to indemnify the mortgagor, but the deed was not executed by the purchaser:—Held, that the statement of the amount in the deed was not an acknowledgment of which the mortgagee could take the benefit, and that as against an encumbrancer claiming under the purchaser the mortgagee was entitled to only six years' arrears of interest. *Colquhoun* v. *Murray*, 26 Ont. App. 204.

—Prescription of interest—Instance claiming principal—Arts. 2224, 2250, 2265 C.C.]—Prescription of the interest on a sum is interrupted pending the *instance* by which the capital is claimed, whatever may be the duration of such *instance*. *Wright* v. *Crain*, 7 Que. Q.B. 524.

—Husband and wife—Obligation of wife to contribute towards expenses of family—Arts. 165, 1317, 1423 C.C.]—The obligation of the wife separated as to property from her husband, to contribute to the maintenance of the family (Arts. 165, 1317, 1423 C.C.) is not joint and several with the husband, and a judgment obtained against the husband for professional services rendered to the family does not interrupt prescription as regards the wife. *Piché* v. *Morse*, 15 Que. S.C. 306.

—Commencement of proof in writing—Arts. 316 C.C.P.]—In a cause for a sum of $50 and over it is not necessary that there should be a commencement of proof in writing to establish by witnesses the interruption of the prescription. *Remillard* v. *Moisan*, 15 Que. S.C. 622.

—R.S.N.S. c. 112—Judgment registered to bind lands—Acknowledgment within twenty years—Execution—Estoppel.]—In May, 1868, defendant recovered judgment against N., for $253.65, of which a certificate was registered to bind real estate. In March, 1874, N. conveyed to his son, the plaintiff, who was aware that the judgment was outstanding and unsatisfied, a portion of the lands bound by the judgment, the conveyance being prepared by defendant at the request of N., and delivered in defendant's presence. In 1889, N. died, having some years previously given defendant an acknowledgment in writing shewing that the sum of $182.30 was still due on the judgment. In 1898, defendant obtained an order for leave to issue execution, and issued execution under which the sheriff levied on the land conveyed to plaintiff. The principal contention for plaintiff was that all proceedings on the judgment were barred by the Statute of Limitations, R.S. c. 112, s. 11, more than twenty years having elapsed since the recovery of the judgment:—Held, that the proceeding by the sheriff was not an entry to recover land or the rent thereof, and that s. 11 had, therefore, no application; Held, that the proceeding being one to recover a sum of money secured by a judgment in relation to which an acknowledgment in writing had been given within twenty years, came directly within the provisions of s. 21; Held, that the part taken by defendant in connection with the drawing and delivery of the deed, at the request of N., did not constitute an estoppel. *Naugler* v. *Jenkins*, 32 N.S.R. 333.

—Acknowledgment to indorsee of note.]

See Sale of Goods, IV.

VI. Period of Prescription.

—Fire insurance—Condition.]—Where a condition of a policy of insurance against fire requires that actions based thereon shall be commenced within twelve months from the date of the fire an action commenced after that date is prescribed. *Prévost* v. *Scottish Union Ins. Co.*, 14 Que. S.C. 203.

—Prescription—Art. 2261 C.C.—Damages for breach of commercial contract.]—An action of damages against a bank for not giving notice of the arrival of goods to the transferee of the bill of lading, being a claim based on a breach of a commercial contract, is not subject to the prescription of two years under Art. 2261 C.C. *Masson* v. *Merchants Bank of Canada*, 14 Que. S.C. 293.

—Privilege of builder—59 V., c. 42 (P.Q.)—Privilege registered under amending statute.]—Where a privilege both by the law as it previously existed and by the amending Act is made to depend upon and date from its registration, the effects of the registration of such privilege after the coming into force of the amending statute are governed by the provisions thereof. Therefore, the prescription applicable to a builder's privilege registered after the coming into force of the amending statute 59 V., c. 42 (P.Q.) is that of one year from the date of the registration. *City of Montreal* v. *Lefebvre*, 14 Que. S.C. 473.

—Constituted rents—Arrearages.]—Arrearages of constituted rents capitalized in a new deed are prescribed by thirty years, not by five. *City of Quebec* v. *Hamel*, 15 Que. S.C. 60.

—Municipal Council—Procès-verbal—Petition to quash.—A petition to quash a *procès-verbal* is not prescribed by lapse of more than thirty days between date of coming into force

of *procès-verbal* and date of presentation to the Court of the petition; if it has been served within thirty days. *Comeau* v. *Ste. Hwidge de Clifton*, 15 Que. S.C. 405.

—Commercial transaction — Loan by trader to non-trader.]—In determining whether a claim is subject to prescription as being a claim of a commercial nature, the status or quality of the creditor, and not that of the debtor, has to be considered, and therefore a loan of money made by a money lender in the ordinary course of his business, being a claim of a commercial nature though the loan be made to a non-trader, is subject to prescription of five years. *Angers* v. *Dillon*, 15 Que. S.C. 435.

—Action against notary — Notice — Art. 2598 R.S.Q.]—An action against a notary for damages by reason of some act in the exercise of his functions requires a month's previous notice and is prescribed by six months. *Lasnier* v. *Dozois*, 15 Que. S.C. 604.

—Board and lodging—Hotelkeeper—Art. 2262, par. 4, C.C.]—Par. 4 of Art. 2262 C.C. is not new law, and the prescription of one year which it prescribes is applicable only to actions by hotelkeepers, boarding-house keepers, and other persons in the same business. *Nand* v. *Marcotte*, 2 Que. P.R. 145, overruling the *motifs* of 15 Que. S.C. 360, but affirming its result.

— Special assessment for drain — Art. 4555 R.S.Q.]—A special assessment for the construction of a drain levied and payable in a single amount, overdue, is an "arrear of municipal taxes" within the meaning of Art. 4555 R.S.Q., and is prescribed by three years. *City of St. Henri* v. *Coursol*, 15 Que. S.C. 417, reversing 13 S.C. 222; affirmed by Court of Queen's Bench, Sept. 30th, 1899.

—Promissory note—Consideration—Money lent.] The debt arising from money lent and acknowledged by a promissory note made at the time of the loan has an existence separate and distinct from the note itself. Thus the note may be prescribed in five years in Quebec, while the sum lent, which forms the consideration, is subject only to a longer period. *Bouchard* v. *Bherer*, 5 Rev. de Jur. 263.

—School commissioner—Action for damages—Arts. 2598, 2599 R.S.Q.]—A Commissioner of Schools is a public officer, and an action against him for damages arising out of something done in the exercise of his public duties, is prescribed by six months if he has acted in good faith. *Molleur* v. *Faubert*, 2 Que. P.R. 281.

—Municipal by-law—Proceedings to quash.]—An application to quash a municipal by-law for illegality can be presented to the Superior Court or a judge thereof, or to the Circuit Court, within three months from the time it is brought into force; but, after the expiration of such delay, the action or petition to have it quashed is prescribed. *Prévost* v. *City of St. Jerome*, 5 Rev. de Jur. 395.

VII. Prescription under Foreign Law.

—Motion to reject answer—Arts. 2193, 2260 C.C.]—In an action for the recovery of a debt, which would on its face have been prescribed under our law, but which is not prescribed according to the laws of the country where the cause of action arose, the foreign law must be alleged in the declaration, and an answer alleging it, after a plea of prescription has been put in, will be rejected on motion. *Shattuck* v. *Tyler*, 2 Que. P.R. 143.

LIQUOR LICENSE.

—Dominion licenses—Ontario wholesale license—Sale in license district to unlicensed persons.]—A brewing company, holding the Dominion license referred to in s. 51, s.s. 1, of the Liquor License Act, R.S.O., c. 245, and also a provincial wholesale license, as defined by s.s. 4 of s. 2 of that Act, sold through their manager liquor in wholesale quantities to an unlicensed person in the district in which they had obtained their provincial wholesale license:—Held, that the sale was authorized under s.s. 3 of s. 51 of the Act; and that it was not requisite for the company to take out another wholesale license in the form issuable under s. 34. *The Queen* v. *Guittard*, 30 Ont. R. 283.

—Mandamus—Notice of action—Rescission of grant of license—Discretion.]—An action for a mandamus to compel license inspectors and license commissioners to perform their respective duties, and for damages as subsidiary relief, is not within the terms of R.S.O., c. 88, "An Act to protect Justices of the Peace and others from Vexatious Actions," and no notice of action is necessary. In an action to enforce the issue of a license which, by resolution of the commissioners, had been granted to the plaintiff, but which resolution was afterwards rescinded in order to grant the license to a subsequent applicant:—Held, that the license commissioners appointed under the Liquor License Act have, in the exercise of their functions, a wide discretion; but it must be exercised judicially, and the Court has power to compel them to so exercise it; that the commissioners were not acting judicially, but unfairly and contrary to the spirit and intent of the Act, in rescinding their resolution in order to grant a license to a subsequent applicant; but, as such license had been issued to him, and the ordering of the issue of a license to the plaintiff would be ordering the issue of a license in excess of the number limited by law, no relief could be granted, and the action was dismissed, but without costs: *Leeson* v. *The Board of License Commissioners of the County of Dufferin*, 19 Ont. R. 67, not followed; *Haslem* v. *Schnarr*, 30 Ont. R. 89.

—Sale to inebriate—Order forbidding—Requisites of.]—The defendant, a licensed tavern keeper in the city of C., in the county of K., was convicted under s. 124 of the Liquor License Act, R.S.O., c. 245, of selling liquor at a specified time and place to a certain person, "knowing that the sale of liquor to the said J. H., a drunkard, was prohibited by an order in open Court," made by the convicting magistrate. Upon this conviction being removed by *certiorari*, the "order" returned was a memoradum signed by the magistrate, as follows:—"I make an order forbidding any licensed person giving liquor to J. H., in the county of K., for one year." It did not appear where and in what circumstances this was made: whether in open Court; whether after summons to J. H.; whether excessive use of liquor by him was proved or admitted, or not:—Held, that the conviction was bad, and there was nothing in the evidence by which it could be amended. *Semble*, that if there was a proper order brought to the knowledge of the defendant, there would be a violation of the law in making a sale to the inebriate, though the liquor was given to and actually drunk by other persons on the licensed premises. *The Queen* v. *Mount*, 30 Ont. R. 303.

—N. S. Liquor License Act, 1895—Collusive arrangement—Appeal—Costs.]—In a prosecution for selling intoxicating liquors in violation of the provisions of the Nova Scotia Liquor License Act, 1895, defendant relied upon an alleged lease of the bar room of his hotel, and of two rooms used in connection with the bar, to one H. The evidence shewed, among other things, that H. was not a resident of the province; that the only public entrance to the bar was through the main office of the hotel; that the person employed as bar-keeper got his meals at the hotel, and paid nothing for his board; that defendant's book-keeper took charge of the cash receipts of the bar and paid the same into the bank to defendant's credit; that defendant had never asked H. for rent and had never paid him any part of the receipts; that fines and all cheques for disbursements in connection with the bar were signed by defendant; that there had never been any settlement with H. since the lease was drawn; that taxes had not been transferred to H. on the books of the town; and that defendant sometimes had possession of and used the key of the private door, through which stock was taken into the bar:—Held, affirming the conviction, and dismissing defendant's appeal, that the transaction between defendant and H. was simply a collusive arrangement to enable defendant to sell liquor without license.—Held. also, that costs should not be allowed, the inspector not being liable therefor. *The Queen* v. *Learment*, 31 N.S.R. 387.

—N.S. Liquor License Act, 1895—Conviction—Want of jurisdiction in magistrate—Certiorari—Affidavit required by s. 117.]—The Liquor License Act, 1895, s. 117, enacts that,—"In no case instituted for breach of the Liquor License Act, 1886, or an amending Act, or this Act, shall a writ of *certiorari* issue unless the party applying therefor shall make an affidavit that he did not by himself, or his agent, or clerk, with his knowledge and consent, sell the liquor contrary to law, as charged in the information, or commit the offence charged in the information, as the case may be. Such affidavit shall negative the charge in the terms used in the information, and shall, further, negative the commission of the offence by the agent or clerk of the person accused or convicted, with his knowledge or consent." Defendant was convicted of having sold without license, contrary to the statute, a quantity of liquors which were adjudged to be intoxicating within the meaning of the Act. The facts were admitted, but it was contended that it was a wholesale transaction, and was not illegal because so much of the provisions of the statute as professed to deal with wholesale transactions was *ultra vires*:—Held, that s. 117 was intended to operate, not in the sense of abolishing the writ, but merely as a restriction upon its issue; that its effect was to disable the Court or judge from granting the writ in any case unless the condition precedent or restriction it created had been complied with, —in other words it prescribed a mode of procedure merely; that in the absence of the affidavit required by that section, the Court had no power to grant a writ of *certiorari*, and the application for the writ must be dismissed. *The Queen* v. *McKenzie*, 23 N.S.R. 6, discussed; *Tupper* v. *Murphy*, 3 R. & G. 173, distinguished. *The Queen* v. *Bigelow*, 2 Can. Cr. Cas. 367, 31 N.S.R. 436.

—Man. Liquor License Act—Druggist selling liquor—Man. Pharmaceutical Act.]—When a person, charged under s. 147 of the Liquor License Act, R.S.M. c., 90, with having sold liquor without a license seeks to bring himself within the protection of s. 149 of the Act, his stating on oath that he is a duly registered druggist is not sufficient evidence that he is a druggist duly registered under The Pharmaceutical Act, R.S.M. c. 116, to warrant the quashing of a conviction. Per Dubuc, J.—The granting of a *certiorari* to remove a conviction is a matter for the discretion of the Court; and, when a statute makes provision for an appeal from a summary conviction under it, that discretion should be exercised by refusing the writ, unless special circumstances are shewn. Per Bain, J.—Whether defendant was a registered druggist or not, it was quite open for the complainant to charge him under the general provision of s. 147; and if s. 149 would have afforded him any defence to the charge, the onus lay on him to bring himself by proper evidence within its provision. *The Queen* v. *Herrell* (No. 2), 3 Can. Cr. Cas. 15, 12 Man. R. 522.

—Liquor License Act (Ont.)—Sale in prohibited hours—Defendant as witness for prosecution—

Disclosure of several offences.]—A defendant in a prosecution under the Liquor License Act (Ont.) is compellable to give evidence for the prosecution, although the prosecutor has first called other evidence as to an alleged specific illegal sale, and has failed to prove the same. A defendant may be compelled to testify for the prosecution as to *any* illegal sale on the date charged in the information, as that on which the offence took place; and the question put to him need not indicate the name of any alleged purchaser, or other particulars which would limit the enquiry to such charges as the prosecution could give particulars of. The disclosure in the defendant's testimony of several illegal sales made on the same day, does not invalidate a conviction thereon for illegally selling liquor, although such conviction does not specify to which of such sales the same relates. *The Queen* v. *Nurse*, 2 Can. Cr. Cas. 57.

—Limitation of time for prosecution—Amendment of information to charge offence of another date—Liquor License Act (Ont.).]—An information for illegal selling of liquor under the Ontario Liquor License Act cannot be amended so as to charge an offence of a date more than thirty days before the amendment is made. The power of amending informations under the Liquor License Act, s. 104, under which the justice may "substitute for the offence charged therein, any other offence" against the Act, is controlled by the limitation of time for laying a fresh information (s. 95), and as to the substituted offence is to be treated as laid on the date of the amendment. *The Queen* v. *Hawthorne*, 2 Can. Cr. Cas. 468.

—Intoxicating liquors—Place of sale—Delivery.]—A person licensed to sell liquors by retail at certain premises only, is not guilty of illegally selling because he obtains orders from customers elsewhere, if he puts up the liquors at, and forwards them from, the licensed premises. *The Queen* v. *Hazell*, 2 Can. Cr. Cas. 516.

—Liquor License Act—Intoxicating liquors—Percentage of alcohol—Police magistrate—Territorial jurisdiction.]—Held, following the analogy of *Reg* v. *Wotten*, 34 C.L.J. 746, that diluted lager beer, shewing on analysis 2.05% of alcohol, is an intoxicating liquor within the prohibition of the Liquor License Act. That the Police Magistrate for Toronto Junction had jurisdiction to take the information and adjudicate upon the case, while sitting in the City of Toronto, the offence having been committed in the Village of Woodbridge, within the County of York. *The Queen* v. *McLean*, 35 C.L.J. 241.

—Action for penalties—Form of action.]

See PRACTICE AND PROCEDURE, XLIX.

—Plebiscite—Polling day—Sale of liquor—Plebiscite Act, s. 6—Dominion Elections Act, s. 83.]

See ELECTION LAW.

—Sale without license—Conviction—Certiorari—Deposit—Art. 1074 R.S.Q.]

See PRACTICE AND PROCEDURE, XI.

LIS PENDENS.

—Refusal to vacate—Order of Master or Judge—Appeal.]—*Hodge* v. *Hallamore*, 18 Ont. Pr. 447, *ante* 17.

—Action for rent—Seizure of movables—Opposition to seizure—Second action—Fresh seizure.]

See ACTION, XV.

—Agreement for sale of lands in B.C.—Lis pendens—Cancellation of.]—See SALE OF LAND, I.

LITIGIOUS RIGHTS.

—Judgment—Assignment to attorney.]—The assignment of a judgment to an attorney exercising his functions in the Court which rendered it is not a purchase of litigious rights prohibited by the Quebec Code. *Wilson* v. *Lemonde*, 2 Que. P.R. 156.

LIVERY.

—Livery Stable keeper—Duty to inform hirer of conveyances of danger of special route.]

See BAILMENT.

LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, XV.

LODGING.

—Action for cost—Prescription—Art. 2262 C.C.]

See LIMITATIONS OF ACTIONS, VI.

LOTTERY.

—Guessing competition—Skill and judgment—Contract.]—See CONTRACT, I.

LUMBERMAN.

—Driving, booming, etc. logs—Right of retention for services—Advances by bank—Privilege.]

See LIEN, III.

LUNACY.

—Costs of inquisition terminated by death of alleged lunatic before verdict.]—K., a person alleged to be of unsound mind, died during the progress of an inquisition as to his lunacy, and before verdict. On an applica-

tion by the petitioner in lunacy, supported by an affidavit that the proceedings were taken *bona fide*, and for the sole and only purpose of protecting K.'s estate, Drake, J., made a declaration that the costs of the inquisition had been properly incurred and ought to be paid out of K.'s estate in due course of administration. *Re Kaye*, 6 B.C.R. 61.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MALICE.

—Slander—Privileged communication—Evidence of malice—Presumption—Rebuttal.]

See LIBEL AND SLANDER, IV.

MALICIOUS PROSECUTION.

—Reasonable and probable cause—Burden of Proof—Nonsuit.]—In an action for the malicious prosecution of a charge of arson against the plaintiff:—Held, that the burden was on the plaintiff to shew that the defendants acted without reasonable and probable cause; and the evidence of the plaintiff failing in this respect, and enough appearing to satisfy the Court that the defendants took reasonable steps to inform themselves of the facts touching the fire and the apparent complicity of the plaintiff therein, he was properly nonsuited. *Malcolm* v. *Perth Mutual Fire Insurance Co.*, 29 Ont. R. 717, affirming 29 Ont. R. 406, and C.A. Dig. (1898) 264.

—Reasonable and probable cause—Assault on person demanding payment of account—Expulsion from house.]—The plaintiff's wife assaulted and beat a person who came to ask for payment of an account, and who refused to leave the house when requested to do so. The person so assaulted caused the woman to be arrested, but the charge was dismissed by the magistrate. In an action of damages for malicious prosecution:—Held, that the plaintiff, by himself or by anyone acting for him, had a right to use the force necessary to expel from his house a person who refused to go when requested, but he had no right, either himself, or by any one acting for him, to fall upon him and beat him, as his wife had done in this case. Under the circumstances the complaint for assault was not laid without reasonable and probable cause. *Lavigne* v. *Lefebvre*, 14 Que. S.C. 275.

—Security for costs—False affidavit—Perjury—Action for damages—Probable cause.]—Where an affidavit of justification to a bond for security for costs has been given, and the party making the same, had not sufficient goods, beyond the legal exemptions, and a prosecution for perjury has been instituted against him, even though he be discharged from the accusation, no action for damages will lie for malicious arrest, there having been probable cause for the issuing of a warrant. *Lalande* v. *Campeau*, 5 Rev. de Jur. 438.

MANDAMUS.

—Contract—Performance in specie—Mandamus—How granted—Private rights.]—The Court will not direct in an action the issue of a writ of mandamus, where the duty to be fulfilled arises out of an agreement the performance of which in specie is not deemed enforceable by the Court. *Semble*, a prerogative writ of mandamus cannot be granted in an action but only on motion, but even if it can be granted in an action it will not be granted to enforce private rights arising under an agreement. *City of Kingston* v. *Kingston, Portsmouth and Cataraqui Electric Railway Co.*, 25 Ont. App. 462, affirming 28 Ont. R. 399 and C.A. Dig. (1897) 203.

—Municipal Corporation—Unnecessary relief—Farm lands—Assessment of—Exemption—By-law.]—A writ of mandamus will not be granted when if issued it would be unavailing, or where there is no necessity for the relief. When it appeared on the evidence that certain farm lands were not charged or assessed for any of the purposes mentioned in s.s. 2 of s. 8, c. 224 R.S.O., a mandamus directed to the reeve and councillors of a village to pass a by-law declaring what part of the farm lands should be exempt or partly exempt from taxation for such expenditure was refused. *Re Giles* v. *Village of Wellington*, 30 Ont. R. 610.

—Company—Transfer of shares—Mandamus to compel registry—Procedure.]—A writ of mandamus to compel the entry in the books of a company of a transfer of shares, should be directed against the company itself and not against the directors. *Upton* v. *Hutchison*, 15 Que. S.C. 396; affirmed on appeal, 2 Que. P.R. 300.

—Criminal law—Procedure—Art. 992 C.C.P.—Crim. Code, ss. 558-559.]—No mandamus will be granted unless it is shewn that the public officer or Court of inferior jurisdiction has omitted, neglected, or refused to perform a duty belonging to such officer, or any act which by law he is bound to perform.—Mandamus will not be allowed to revise the decision of magistrates who have once heard a case and decided it in a matter within their jurisdiction.—The law does not oblige a magistrate to issue his warrant except when, in his opinion, a case for so doing is made out, and under s. 559 Crim. Code, he is not obliged to give all his reasons, he has merely to express his opinion; when he does so, the magistrate cannot be considered as having omitted, neglected, or refused to perform the duty of his office. *Thompson* v. *Desnoyers*, 3 Can. Cr. Cas. 68.

—Harbour Board — Defective information and complaint—Refusal of secretary to receive.]

See HARBOUR COMMISSION.

— Municipal Council—High School—Contribution to maintenance—Enforcement of by mandamus.]

See SCHOOLS.

— Common Schools Act, C.S.N.B. c. 65, s. 74 — Change of residence—Trustees—Refusal to allow children to attend school.]

See SCHOOLS.

MANITOBA REAL PROPERTY ACT.

—Caveat — Description of property — Second caveat.]—The direction in Schedule O to the Real Property Act does not require that the description of the land given in the caveat should be word for word the same as that in the application, but the caveat will be sufficient if the description given is such as will enable the property to be located on the ground. The description in the caveat was as follows: "Lot No. 32 in block 15, as shewn upon a plan of Oak Lake, being a subdivision of the N½ of section 23, in township 9, in range 24W. of the P.M. in the Province of Manitoba," and it was shewn that there were four plans filed in the Registry Office relating to different portions of the town of Oak Lake:—Held, nevertheless, that, as it was not shewn that there was a lot No. 32 in block 15 in more than one of such plans, the description was sufficient. The caveat was filed in the names of Charles Adams and John H. Adams as partners in the firm of Adams Bros., as creditors of a certain insolvent, and Charles Adams had previously filed a caveat as assignee in trust against the same application, and based upon the same allegations as to title; Held, that the objection that the present was a second caveat filed without leave by the same person could not be sustained. *Adams* v. *Hockin*, 12 Man. R. 433.

MARKET.

—Grant for—Construction—Weigh scales—Subsequent Statute—Effect on grant.]

See MUNICIPAL CORPORATIONS, XX.

MARKSMAN.

—Promissory note by—Witness also marksman.]

See BILLS OF EXCHANGE AND PROMISSORY NOTES, XI.

MARRIAGE.

See HUSBAND AND WIFE.

MARRIAGE SETTLEMENT.

—"Children"—Vested remainder.]—By a marriage settlement certain land was conveyed to trustees in trust to sell and convey, as the husband and wife might appoint, and to invest the money and pay the interest to the wife during life; and in case the husband survived the wife, and there was a child or children then surviving, to pay the interest to the husband during life, and after the decease of both to divide the money equally among the children, and if there was only one child to pay the whole to such child; and in case of the death of the wife without issue, to pay the money to the husband; and in case the husband and wife did not make any appointment, then in trust to support the contingent remainders thereinafter limited, and to pay the rents on the same trusts as the money. Two children were born; the husband died; one of the children attained twenty-one, married, and died before his mother, leaving his sister and a daughter surviving. On the death of the mother:—Held, that the deceased son took a vested interest, although he died before the period for conveying, and that his daughter was entitled to her father's share. *Lazier* v. *Robertson*, 30 Ont. R. 517.

MASTER'S OFFICE.

—Settlement of action—Pending reference—Duty of master—Dispute as to terms of settlement—Finding—Report—Opening up—Costs.]

See ACTION, XXII.

MASTER AND SERVANT.

I. ACTION FOR WAGES.

—R.S.O. c. 157—Appeal—Costs—Witness fees—Division Court.]—A Justice of the Peace may award witness fees as part of the costs of a proceeding under R.S. Ont. c. 157, s. 11. He should be governed by the Division Court tariff in fixing the amount.—In an appeal in such a case, the Division Court has no power to give costs of the appeal. *Re Bonter* v. *Chapman*, 35 C.L.J. 244.

II. CONTRACT OF SERVICE.

—Hiring of servant by third party—Control over service—Negligence.]—A Plate Glass Co. hired by the day the general servant and horse and waggon of another company for use in its business, and while so hired the servant, in carrying a load of glass, knocked a man down and seriously injured him:—Held, that the Plate Glass Co. was not liable in damages for the injury; that the driver remained the general servant of the company from which he was hired, and not that of the Plate Glass Co. *Consolidated Plate Glass Co.* v. *Caston*, 29 S.C.R. 624, reversing 26 Ont. App. 63.

—Corporation—Corporation seal—Usual expenses, what included in.]—The plaintiff was engaged by the president of the defendant railway company to act as chief engineer of the railway at a salary of $250 per month besides his "usual expenses," and served in that capacity for about nineteen months:—Held, that he was entitled to recover at the rate agreed on for his services, although there was no contract under seal. *Bernardin* v. *North Dufferin*, 19 S.C.R. 581 followed:—Held, also, that the plaintiff's board while at his headquarters was not included in the "usual expenses" which he was to receive in addition to his salary, but sums paid out for board while away from his usual quarters on the company's work would be so included. *Forrest* v. *Great North-West Central Ry. Co.*, 12 Man. R. 472.

III. Dismissal of Servant.

—Wrongful dismissal—Malice.]—Plaintiff and defendant entered into a contract in writing for the hiring of plaintiff by defendant, the term of hiring to commence on the 25th April, and defendant reserving to himself, if he had cause, the right to discharge plaintiff at any time during the engagement, paying him up to the day of his discharge. On the 7th April defendant wrote plaintiff that, as the season was going to open much earlier than usual, they would have to start before the appointed time, and requested plaintiff to report himself at H. on Tuesday next (April 12th). Plaintiff reported himself as requested, and was discharged the following day by defendant, who tendered him a sum sufficient to cover his time and expenses, up to the time of his discharge:—Held, reversing the judgment of the County Court Judge for district No. 1, that plaintiff was employed under the terms of the written agreement at the time of his dismissal.—Held, also, that under the reservation in the contract, defendant had the right to discharge plaintiff at any time, provided he exercised the right *bond fide* and without malice. *Doyle* v. *Wurtzburg*, 32 N.S.R. 107.

IV. Injury to Workman.

(*a*) *Liability of Master Under Civil Code.*

—Dangerous employment—Injury to workman in—Liability of master.]—The proprietor of an industrial establishment who causes a workman to perform work of a very dangerous character, especially when the workman has not usually been employed in work of the kind and is not paid wages based upon the risks he may run, is responsible in damages if the workman loses his life in performing such work. *Price* v. *Roy*, 8 Que. Q.B. 170.

—Employment requiring special care—Imprudence of employee.]—Where an employee is engaged in an occupation which requires special care and attention on his or her part to prevent accidents (in this instance, the washing of soda water bottles), and the evidence shews that the injury complained of resulted not from any fault on the part of the employer, but from the failure of the employee, although cautioned several times, to give necessary care and attention, the employer is not responsible. *Garand* v. *Allan*, 15 Que.S.C. 81.

— Responsibility — Personal injuries — Insufficiency of tackle.]—Where an accident results from the insufficiency of tackle—as in this case, in which the chock holding the hawser used in towing gave way, and the plaintiff, a workman, was struck by the hawser—the employer is responsible. *Abbott* v. *Anderson*, 15 Que. S.C. 281.

—Responsibility—Carelessness of employee.]—The plaintiff's daughter, while printing envelopes on a Gordon press, dropped some of the envelopes, and while stooping to pick them up, her sleeve was caught in the cog-wheels, and her arm was injured. The factory inspector had never directed the cog-wheels to be covered, and in practice the wheels of these presses are never covered, and no like accident was known to have occurred before:—Held, that the employer could not be held responsible, the accident being the result of the employee's carelessness. *Hunt* v. *Wilson*, 15 Que. S.C. 355.

—Negligence—Proximate cause—Contributory negligence—Responsibility.]

See Negligence, XV.

(*b*) *Workmen's Compensation Acts.*

—Defect in plant—Damages—Infant—Mother's services and expenditure.]—The infant plaintiff, who was employed in a canning factory, was injured by the explosion of a retort or boiler in which vegetables were being cooked. The cooking was done by steam which was forced through the boiler, there being an intake pipe and an escape pipe which had to be adjusted by hand, and no safety valve or automatic escape pipe. There was no evidence of the cause of the explosion and the defendants contended that it was due to a latent defect in the boiler:—Held, that it might properly be inferred that the explosion was caused either by the negligence of the person whose duty it was to adjust the escape pipe, or by the absence of the safety valve, and that in either view the defendants were liable. Held, also, that the mother of the infant could not recover for her services in attending upon him during his illness, and for moneys expended and liabilities incurred by her for medical attendance, nursing and supplies, she not being in the legal relationship of master to him or under legal liability to maintain him. *Wilson* v. *Boulter*, 26 Ont. App. 184.

—Proximate cause of accident—Negligence—Way—Defect.]—The plaintiff in an action under the B.C. Employers' Liability Act, for

damages caused by a defect in his employers' "works and ways" cannot succeed if on the facts proved the jury can only conjecture how the injury occurred. Rule 18, of s. 25, c. 134, R.S.B.C. 1897, does not require that a winze extending through several levels of a metalliferous mine shall be protected at each level; the rule is sufficiently complied with if the winze is protected at the top level only. *Stamer* v. *Hall Mines*, 6 B.C.R. 579.

—Injury to employee on railway—Fellow servant.]

See RAILWAYS AND RAILWAY COMPANIES, VI.

V. MUNICIPAL EMPLOYEES.

—Negligence — Independent contractor.]—The relationship of master and servant does not exist between a municipal corporation and a teamster hired by them by the hour to remove street sweepings with a horse and cart owned by him, the only control exercised over him being the designation of the places from which and to which the sweepings are to be taken, and the municipal corporation are not liable for an accident caused by his negligence while taking a load to a designated place. *Sanders* v. *City of Toronto*, 26 Ont. App. 265, reversing 29 Ont. R. 273, and C.A. Dig. (1898) 272.

MEDICAL PRACTITIONER.

—Arrest for fees for medical services—Affidavit to hold to bail.]

See DEBTOR AND CREDITOR, II.

—Action for professional services—Want of allegation of capacity—Defence—Exception à la forme—Inscription en droit.]

See PRACTICE AND PROCEDURE, XLVIII.

MILITIA.

—Canada Temperance Act—Military canteen—Canada Militia Act, 1886—Queen's Regulations—R.S.C. c. 41.]—An infantry school corps has the right to establish and maintain a canteen to be conducted in accordance with the Queen's Regulations; and, inasmuch as the active Militia is subject to these orders and regulations, every officer and man of the Militia, from the time of being called out for active service and also during the period of annual drill or training, has an equal right with the members of the infantry school corps to purchase ale and other articles for sale at the canteen. Such sale is not a contravention of the Canada Temperance Act. *Ex parte Patchell*, 34 N.B.R. 258, 3 Can. Cr. Cas. 75.

MINES AND MINERALS.

I. ACCIDENTS TO WORKMEN.

— B.C. Employers' Liability Act — Accident in mine—Way—Winze.]

See MASTER AND SERVANT, IV. (*b*).

II. ADVERSE CLAIMS.

—Parties to actions—Joinder of defendants—Adverse claimants.]—All claimants under the B.C. Mineral Act to any part of the ground covered by the mineral claim of a plaintiff may be made defendants to an action by him to enforce an adverse claim by him against any one of such claimants. *Dunlop* v. *Haney*, 6 B.C.R. 170.

—Mineral Acts (B.C.)—Adverse claim—Affirmative evidence—Practice.]—Section 11 of the Mineral Act Amendment Act, 1898, applies to all adverse proceedings, including those commenced before the Act. By proving (1) his free miner's certificate; (2) prior location and due record; and (3) the overlapping of the claims in dispute, a prior locator who is plaintiff in adverse proceedings makes out a *prima facie* case. *Schomberg* v. *Holden*, 6 B.C.R. 419.

—Adverse proceedings—No satisfactory affirmative evidence.]—Where both parties in adverse proceedings failed to establish title to the property in dispute, the Judge so found, and judgment was entered accordingly, without costs to either party. *Ryan* v. *McQuillan*, 6 B.C.R. 431.

—Adverse action—Writ of summons—Renewal of.]—The plaintiff in an adverse action issued a writ on 5th August 1897, and not having served it, obtained on 2nd August, 1898, upon an ex parte application, an order for renewal; the order was, on the application of the defendant, set aside.—Held, on appeal to the Full Court, that no reasonable explanation of the delay being given the order for renewal was properly set aside, but that s. 37 of the Mineral Act does not enable a defendant to get rid of an action by applying in a summary way when not

authorized by the ordinary practice of the Court. *Haney* v. *Dunlop*, 6 B.C.R. 520, affirming 6 B.C.R. 451.

—Mining suit—Mode of trial.]

See PRACTICE AND PROCEDURE, LVIX.

III. ASSESSMENT WORK.

—B. C. Mineral Act, 1896—Assessment work—Power to extend time for—Abandonment and forfeiture.]—An Order in Council, under s. 161 of the Mineral Act, 1896, extending the time for the doing and recording of assessment work on a mineral claim, is *intra vires*. A certificate of work recorded pursuant to permission granted by a Gold Commissioner acting under such an Order-in-Council, is a good certificate within s. 28 of the said Act. *Peters* v. *Sampson*, 6 B.C. R. 405.

IV. CONTINUING VEIN.

—Right to follow vein—Practice—Injunction—Order for inspection.]—The Centre Star Company had been enjoined from mining in the Iron Mask Claim, in which it was alleged was a continuation of a vein whose apex was in its own claim, and was also refused leave to do experimental or development work on the Iron Mask claim in order to determine the character or identity of the said vein:—Held, by the Full Court, on appeal (Martin, J., dissenting) refusing to modify said orders, that it ought to be left to the Trial Judge to decide whether it was necessary to have any work done to elucidate any of the issues raised. *Centre Star* v. *Iron Mask*, 6 B.C.R. 355.

V. FREE MINER'S CLAIM.

—B. C. Mineral Act, 1896—Statute of Frauds—Verbal agreement.]—The interest of a free miner in his mineral claim is an interest in land and an agreement not in writing respecting it cannot be enforced. Where one person on behalf of another locates and records a claim in his own name, the Court will compel him to transfer the claim to his principal. *Fero* v. *Hall*, 6 B.C.R. 421.

VI. INSPECTION OF MINE.

—Coal areas—Inspection of workings—Order for.]

See PRACTICE AND PROCEDURE.

VII. LOCATION OF CLAIMS.

—Mining location—Mineral Act, 1896—Priorities between locators.]—An error in the statement on the initial post of the approximate compass bearing of No. 2 post of N.E. and S.W. instead of N.W. and S.E. is fatal to the validity of the location of the mine. Such a mode of location was calculated to mislead other persons desirous of locating claims in the vicinity; and therefore could not be treated as a *bona fide* attempt to comply with the provisions of the Mineral Act, 1896. The plaintiffs' prior location not having been recorded within the prescribed time was abandoned and of no validity as against the defendant's subsequent location properly recorded. *Francoeur* v. *English*, 6 B.C.R. 63.

—B.C. Mineral Acts—Location—Blazing—Adverse claim—Affidavit made by plaintiff's husband—Re-opening of case—County Court—Pleading—Costs.]—Per Walkem, J.: To constitute a valid location, the statutory requirements as to blazing must be complied with. *Semble*, after the case of the adverse claimant has been closed the Court will not allow the case to be re-opened to enable the claimant to give fresh evidence as to his location:—Held, on appeal, ordering a new trial: (1) If the defendant wishes to rely on defects in the plaintiff's location he must set them forth specifically in his pleading. (2) The fact that the affidavit was made by the claimant's husband does not *ipso facto* vitiate the adverse claim, but the question is one of *bona fides* under the Act. (3) No costs of appeal will be given to the appellant who succeeds on a point not taken below. *Quære*, whether the County Court has jurisdiction, also whether trespass lay independently of the proceeding by adverse claim. Per Walkem, J., on new trial dismissing the action: The affidavit of adverse claim must be made by the claimant. *Aldous* v. *Hall Mines*, 6 B.C.R. 394.

—Mineral claim—Occupation of—Defects in location—Right to relocate.]—The defendant's mineral claim, Grand Prize, was recorded in June, 1894, and certificates of work were issued in respect of it in June, 1895, and in June, 1896. The plaintiff in July, 1896, located the Buffalo Bill claim on the same ground, and attacked defendant's location on the ground that his posts were situate outside the limits of his claim:—Held, that defendant's ground, being actually occupied and actively worked, was not open to location. *Waterhouse* v. *Liftchild*, 6 B.C.R. 424.

—Mineral claim—Defects in location of—Mistake in giving approximate compass bearing.]—The defendant's mineral claim, Cube Lode, was located in May, 1892, and duly recorded and certificates of work were issued in respect of it regularly since. The plaintiff, in 1896, located and recorded the Cody Fraction and the Joker Fraction claims on the same ground and attacked the defendant's location on the ground that upon the initial post the "approximate compass bearing" of No. 2 post was not given as required by the Act:—Held, that the irregularity in locating was cured by the defendant's recording his last certificate of work. *Callahan* v. *Coplen*, 6 B.C.R. 523.

—B.C. Mineral Act, 1894—No. 1 post in U.S.A.]—It appearing that the No. 1 post of a mineral claim was upon the United States side of the International Boundary Line:—Held, that the location was invalid. *Connell* v. *Madden*, 6 B.C.R. 531, affirming 6 B.C.R. 76.

VIII. Partnership.

—Partnership in mining venture.]

See Partnership, IV.

IX. Penalties.

—Coal Mines Regulation Act, C.S.B.C. 1888, c. 84, s. 4—Summary conviction—Prohibition without penalty—Quashing conviction.]—The Coal Mines Regulation Act, by s. 4, provided: "No boy under the age of twelve years, and no woman or girl of any age, shall be employed in or allowed to be for the purpose of employment in any mine, to which this Act applies, below ground. By s. 12, if any person contravenes or fails to comply with, etc., "any provision of this Act with respect to the employment of women, girls, young persons, boys or children, he shall be guilty of an offence against this Act." By s. 95, "every person who is guilty of an offence against this Act shall be liable to a penalty not exceeding, if he is . . . the manager, $100.00." In 1890, s. 4 was amended by inserting the words, "and no Chinamen" after the word "age." The defendant was convicted before two Justices of the Peace of having employed a Chinaman in a coal mine under ground, and was fined $100.00. Upon application for *certiorari* to quash the conviction:—Held (by Drake, J., confirmed by the Full Court—Davie, C.J., Walkem and Irving, JJ.), that a contravention of the amendment to s. 4 prohibiting the employment of Chinamen was not made an offence under the Act for which any penalty is imposed, and that the penal Act should not be extended beyond the reasonable construction which the words used would bear. The Interpretation Act, s. 8, s.s. 21, providing that "any wilful contravention of any Act which is not made an offence of some other kind shall be a misdemeanour and punishable accordingly," did not assist the conviction. *The Queen* v. *Little*, 6 B.C.R. 78.

X. Prospecting License.

—Prospecting license—Mortgage—New title.]—K. was the holder of a prospecting license over certain gold mining areas under which he was entitled, at any time prior to the expiration of the license, on payment of the statutory fees, to the exclusive right to a lease of the areas for the term of twenty-one years. K., having mortgaged his rights to plaintiff as security for the repayment of a loan, fraudulently, and for the purpose of defeating the mortgage, allowed his license to expire, and his right to a lease to become forfeited, when the areas were taken up by D., another defendant, with money supplied by K., and transferred to K.'s son:—Held, affirming the judgment of the Trial Judge, that the transfer was fraudulent and without consideration, and that the mortgage to plaintiff attached to the new title. *Griffin* v. *Kent*, 31 N.S.R. 528.

XI. Sale.

—Sale of land—Agreement for sale—Mutual mistake—Reservation of minerals—Specific performance.]—See Sale, IX.

XII. Surface Rights.

—Crown grant of mineral claim—Surface rights—Mineral Acts—R.S.B.C. 1897, c. 132, s. 16.]—Plaintiff sued for cancellation of a lease from the defendant on the ground that the defendant's Crown grant did not pass the surface rights:—Held, by Irving, J. (without deciding whether it did or not), that the action failed on the ground that the plaintiff had not affirmatively proved that the grant did not pass the surface rights. S. 16 of the Mineral Act Amendment Act, 1897 (s. 132, Mineral Act), is declaratory and not prospective merely. *Spencer* v. *Harris*, 6 B.C.R. 466.

XIII. Subsidence of Surface.

—Coal mining company—Subsidence of surface caused by excavation by previous occupier.]—Held, that, at common law, a coal mining company is not liable for damages caused by a subsidence of the surface occurring during its occupation, but resulting from an excavation made by a previous occupier. *Greenwell* v. *The Low Beechburn Coal Co.* (1897), 2 Q.B. 165, followed:—Held, further, that the N. S. Acts of 1892, c. 1, impose no liability in this particular upon a company engaged in mining coal, which would not exist at common law. *Town of Stellarton* v. *Acadia Coal Co.*, 31 N.S.R. 261.

MINORS.

—Municipal corporations—Police commissioners—Second-hand stores—By-law as to dealing with minors.]

See Municipal Corporations, III (*g*).
" Infant.

MIS EN CAUSE.

See Parties, VIII.

MISTAKE.

—Payment of current taxes in ignorance of prior sale for arrears—Action to recover.]

See Assessment and Taxes, I.

MITOZENNETÉ.

— Mitozen wall — Encroachment — Footing course.]—See Party Wall.

—**Servitude—Division wall—Fence wall—Art. 520 C.C.**]—See SERVITUDE.

—**Servitude—Construction of house—Use of adjoining wall.**]—See SERVITUDE.

MORTGAGE.

I. CHARGE ON LANDS.

—**Expropriation of land by the Crown—Mortgagees—Parties—Costs.**]—Where mortgagees were made parties to an appropriation proceeding and they had appeared and were represented at the trial by counsel, although they did not dispute the amount of compensation, they were allowed their costs. *The Queen* v. *Wallace*, 6 Can. Ex. C.R. 264.

II. CONSOLIDATION OF MORTGAGES.

—**Derivative mortgage—Redemption.**]—The plaintiff as mortgagee of land of which the defendant was the owner of the equity of redemption, was also derivative mortgagee from the latter of other lands:—Held, that the plaintiff was entitled to consolidate his claims in an action of foreclosure; held, also, that the plaintiff might foreclose the original mortgage, without making the original mortgagor a party. *Silverthorn* v. *Glazebrook*, 30 Ont. R. 408.

III. CONTRACT OF MORTGAGE.

—**Variation of contract—Mortgage—Principal and surety—Novation.**]

See PRINCIPAL AND SURETY, II.

IV. COVENANTS AND OBLIGATIONS.

—**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 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 three purchasers and against the lands. The mortgagee having brought an action against C. on his covenant in the mortgage:—Held, 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*, 29 S.C.R. 126, reversing 24 Ont. App. 492.

—**Sale "en justice"—Construction of contract—Payment of mortgage—Special indemnity.**]—The creditor (contestant), under the terms of a deed of obligation and mortgage, was to be entitled to receive 10 per cent. on his capital, as liquidated damages in the event of the property hypothecated to him as security for a loan, being sold *en justice*, or dealt with in any way which might oblige him to receive his capital otherwise than as stipulated in the obligation. There was a mortgage prior to that of contestant, and it was stipulated in contestant's mortgage that if the first mortgage were paid off, contestant's claim might be paid off at the same time. The borrower having become insolvent, the property hypothecated passed into the hands of a curator, and was by him sold at public auction, subject to the mortgagees, under an authorization granted by a Judge, and with the consent of the mortgagees. The purchaser subsequently arranged with the curator to pay off the first mortgage, and under the above mentioned condition of the contestant's deed of obligation, the curator was at liberty to pay off the latter's claim at the same time. The contestant refused to accept the amount unless he were also paid the 10 per cent. indemnity:—Held, that the sale was not a sale *en justice* within the meaning of the clause in the contestant's mortgage, and that the contestant was not entitled to the indemnity under the terms of the stipulation in the deed. *Re Nelson*, 15 Que. S.C. 368.

V. EQUITABLE MORTGAGE.

—**Equitable estate—Assignment of interest in land—Right to possession—Subsequent mortgage—Notice.**]—See EQUITABLE ESTATE.

VI. Equity of Redemption.

—**Purchaser of Equity of Redemption — Indemnity—Death of mortgagor—Insolvent estate—Administrator — Release.**]—Where the mortgagor is dead and his estate is insolvent, the mortgagee cannot compel the administrator of the estate to seek indemnity from one who purchased the mortgaged estate from the mortgagor subject to the mortgage, nor is the administrator responsible in damages to the mortgagee for having released the purchaser from liability. *Higgins* v. *Trusts Corporation of Ontario*, 30 Ont. R. 684.

—**Redemption — Foreign lands — Constructive trustee.**]—See Conflict of Laws.

VII. Fixtures.

—**Mortgagor and Mortgagee—Wooden building.**]—A small building of thin board, lathed and plastered inside, and divided into three rooms, resting by its own weight on loose bricks laid on the soil, built for and used at first as a booth or shop and then for a time as a dwelling house, was held to be a fixture in an action by the mortgagee of the land although the building was placed on the land, after the mortgage was made, by the mortgagor's husband who swore that it was placed on the land without any intention of leaving it there permanently. *Miles* v. *Anketell*, 25 Ont. App. 458, reversing 29 Ont. R. 21 and C.A.Dig. (1898) 194.

And see Fixtures.

VIII. Foreclosure.

—**Parties—Judgment creditor—Disclaimer—Dismissal of bill—Costs.**]—See Costs, V (*a*).

—**Solicitor and client—Fraudulent misappropriation by solicitor of money to pay off mortgage—Foreclosure action.**]—See Solicitor.

—**Consolidation of mortgages in foreclosure proceedings.**]—See hereunder, II.

—**Sale of land for taxes—Purchase by mortgagor—Subsequent foreclosure—Notice.**]

See Sale of Land, XV.

IX. Insured Premises.

—**Fire insurance — Mortgage — Cancellation of policy—Double insurance—Proofs of loss.**]—A policy of insurance covering the buildings on the mortgaged property and their contents, assigned by the mortgagor to mortgagees as collateral security, cannot be cancelled by the insurance company, at the request of the mortgagees, without notice to the mortgagor. Insurance effected by mortgagees, without the mortgagor's assent, after an attempted cancellation, does not affect the mortgagor's right of recovery on the policy effected by him. Where insurers repudiate liability on a policy, they cannot object that proofs of loss have not been furnished. *Morrow* v. *Lancashire Insurance Co.*, 26 Ont. App. 173, affirming 29 Ont. R. 377.

—**Insurance of property by mortgagee—Collection of amount of insurance.**]—Where buildings on property hypothecated for the security of a loan are insured by the mortgagee as additional security for the sum lent, and a loss by fire occurs, the mortgagee is not obliged to institute proceedings against the insurance company for the recovery of the amount insured, more especially when, as in the present case, the only reason given by the company for not paying the loss is one resulting from the acts of the mortgagor. The latter may ask to be subrogated in the rights of the mortgagee, but only on tender to him of the amount of the mortgage debt. *Montreal Loan and Mortgage Co.* v. *Denis*, 14 Que. S.C. 106.

X. Interest.

—**Acceleration—Instalments—Principal money.**]—A mortgage provided for payment of the whole principal money in two years from the date of the mortgage with interest in the meantime half-yearly at the rate of nine per cent. per annum; that on default of payment for two months of any portion of the money secured the whole of the instalments secured should become payable; and that on default of payment of any of the instalments secured at the times provided, interest at the said rate should be paid on all sums so in arrear:—Held, that the principal money was an instalment within the meaning of the proviso and that interest at the rate of nine per cent. per annum was chargable upon it after the expiration of the two years. *Biggs* v. *Freehold Loan and Savings Co.*, 26 Ont. App. 232.

—**Limitation of actions—Arrears of interest—Acknowledgment.**]—Upon the sale of a property which was subject to mortgage the purchaser and the mortgagor inquired from the mortgagee the amount due, and the mortgagee signed a memo., endorsed upon the mortgage, fixing the amount claimed by him. The deed to the purchaser was made subject to the mortgage, upon which there was stated to be due the amount claimed, and contained a covenant by the purchaser to pay the amount and to indemnify the mortgagor, but the deed was not executed by the purchaser: Held, that the statement of the amount in the deed was not an acknowledgment of which the mortgagee could take the benefit, and that as against an encumbrancer claiming under the purchaser the mortgagee was entitled to only six years' arrears of interest. *Colquhoun* v. *Murray*, 26 Ont. App. 204.

—**Agreement to pay compound interest—Intention.**]—A. and his wife gave a mortgage, bearing date January 25, 1867, on land belonging to the former to secure the payment on June 1, 1867, of £332 16s., with lawful interest. A. also executed his bond conditioned in like terms. In 1875 the

mortgage and bond became vested in the respondent (plaintiff below). On June 12, 1880, A. executed a bond to the plaintiff, reciting that there was due on the first bond on December 31, 1879, for principal and interest, $1,971.90, and providing that, in consideration of time for its payment, annual interest thereon should be paid at seven per cent., and the annual interest as it accrued, if not paid when due, should become principal and bear interest as such. In 1867 and 1873 A. acknowledged by memoranda endorsed on the mortgage the amount due thereon. In both instances the amount was computed by charging compound interest at six per cent., with yearly rests. On August 18, 1887, the balance due December 31, 1886, was struck by charging compound interest at seven per cent., with yearly rests from December 31, 1879, to the time when the balance stated in the second bond was struck and acknowledgment stating the amount was signed by A. upon the mortgage. In a suit for foreclosure after A.'s death against his widow, to whom the equity of redemption had been nominally assigned:—Held, that the acknowledgments endorsed on the mortgage were evidence of an agreement to charge the land with the payment of compound interest at six per cent., with yearly rests, up to December 31, 1886, and that the land was so charged, but that the agreement in the second bond created only a personal liability, and the mortgage bore simple interest at six per cent. from the last mentioned date. *Richardson* v. *Jackson*, 34 N.B.R. 301.

—Rate of interest—Interest after maturity.]—A mortgage provided for payment of the principal on a certain date, with interest thereon at the rate of nine per cent., payable annually, and that the same rate of interest should be paid from and after the expiration of the date fixed for payment of the principal until the whole sum was paid, and that overdue interest should bear interest at nine per cent. per annum. Held, that the principal bore interest at nine per cent. both before and after maturity, and that overdue interest bore interest at nine per cent., whether it accrued due before or after the maturity of the principal. *King* v. *Keith*, 1 N.B. Eq. 538.

—Increased rate—Parol agreement.]—A parol agreement to increase the rate of interest reserved by a mortgage upon land will not be enforced as against the land. *Murchie* v. *Theriault*, 1 N.B. Eq. 588.

XI. Landlord and Tenant.

—Distress—Goods in custodia legis—Chattel mortgage—Fraud.]—Pending a distress, the goods taken are in the custody of the law, and not liable to seizure under a chattel mortgage, so long as no fraud is on foot and no intention or contrivance exists to prejudice the mortgagee: *McIntyre* v. *Stata*, 4 U.C.C.P. 248; *Roe* v. *Roper*, 23 U.C.C.P. 76, and *Whimsell* v. *Giffard*, 3 Ont. R. 1 distinguished; *Langtry* v. *Clark*, 27 Ont. R. 280, distinguished and not followed. *Anderson* v. *Henry*, 29 Ont. R. 719.

XII. Lease by Mortgagor.

—Notice by mortgagee to pay rent—C.S.N.B. c. 83, s. 15—Revocation of notice—Action for rent.]—A mortgagor let the mortgaged premises subsequently to the mortgage. The mortgagees gave a notice to the tenant informing him of the mortgage and requiring him to pay to them all rent due and payable under the lease.—Held, that the notice did not make the tenant the tenant of the mortgagee, and was not an adoption by the mortgagee of the lease within s. 15 of c. 83 Con. Stat.—*Semble*, per Tuck, C.J., that a notice under s. 15, c. 83 Con. Stat. may be revoked by the mortgagee so as to restore the original tenancy between the mortgagor and tenant, and entitle the mortgagor to recover from the tenant rent accrued due before the revocation.—Held, per Barker, J., that a mortgagee is not bound to proceed under s. 15, c. 83 Con. Stat., but may exercise his rights at common law for the recovery of rent payable under a lease of the mortgaged premises made subsequent to the mortgage. *Brock* v. *Forster*, 34 N.B.R. 262.

XIII. Lien.

—Mortgagee's lien.]—See Lien, VI.

XIV. Priority.

—Ante-nuptial contract—Copy of instrument—Defective registration — 57 V., c. 20, s. 69 (N.B.).]—By an ante-nuptial contract entered into in Quebec, the intending husband endowed his future wife in a sum of money as a dower prefixed chargable at once upon his property in New Brunswick. The contract was executed in Quebec before a notary. A copy of the contract certified to by the notary was registered in Madawaska County. Subsequently to its registration, a mortgage by the husband of his real estate in Madawaska County to the plaintiff was registered in that county. The plaintiff had no notice of the ante-nuptial contract.—Held, that as the Registry Act, c. 74 C.S. provides only for the registration of an original instrument, except in certain cases, the copy of the marriage contract was improperly on the records, and the marriage contract was not entitled to priority over the plaintiff's mortgage. *Murchie* v. *Theriault*, 1 N.B. Eq. 588.

XV. Privileges and Hypothecs.

—Keeping land in condition—Expenses of labour and seeding—Art. 2072 C.C.]—The expenses of keeping up the land and cost of labour and seeding are not expenditures within the meaning of Art. 2072 C.C., and the holder (*tiers détenteur*) proceeded against by an hypothecary action cannot demand by way of exception that the surrender be only

ordered subject to his privilege of being paid these expenses and costs. *Ritchie* v. *Girard*, 15 Que. S.C. 162.

—Hypothec—Personal action—Surrender.]—A personal action for money lent cannot conclude for the surrender of the immovable hypothecated to secure such loan. *Anderson* v. *Taillefer*, 2 Que. P.R. 78.

—Hypothecary action—Transfer of judgment against immovable—Signification—Proof—Arts. 1571, 2127 C.C.]—See EVIDENCE, VII.

XVI. PROPERTY NOT IN POSSESSION.

—Hypothec—Suspension of ownership.]—The fact that the exercise of the ownership of property is suspended does not prevent the owner from hypothecating such property. *Hamel* v. *Proteau*, 15 Que. S.C. 619.

XVII. REGISTRATION.

—Equitable titles—Trustee—Proceeds of mortgage—Judgment against trustee personally.]—D., who was trustee for his sister, M., invested money of M., on mortgage, taking and registering the mortgage in his own name. The property having been sold under order of foreclosure and sale, and the proceeds paid into Court:—Held, that plaintiff, the substituted trustee for M., was entitled to the proceeds as against judgment creditors of D. Per Townshend, J., and Graham, E.J.:—Held, that the equitable interest of M. in respect to the securities was not susceptible of registration, and was, therefore, not covered by the Registry Act (R.S.N.S. c. 84). *Oxley* v. *Culton*, 32 N.S.R. 256.

XVIII. SALE.

—Account—Trust—Limitation of actions.]—When a sale is effected under a mortgage made pursuant to the Manitoba Short Forms of Mortgages Act, which, like the Ontario Short Forms of Mortgages Act, provides that the mortgagee shall be possessed of and interested in the moneys to arise from any sale upon trust to pay costs and charges and the principal and interest of the debt and upon further trust to pay the surplus, if any, to the mortgagor, the mortgagee becomes an express trustee of the proceeds of sale and the mortgagor is entitled to bring an action against him for an account, notwithstanding the expiration of six years from the time of sale. S. 32 of the Trustee Act, R.S.O. c. 129, does not apply in such a case, because if there is a surplus it is trust money still retained by the trustee. *Biggs* v. *Freehold Loan and Savings Co.*, 26 Ont. App. 232.

XIX. VALIDITY.

—Mortgage of land—Mistake in name of mortgagee—Void conveyance—Legal title.]—In a mortgage which was intended to be taken in the name of the mortgagee she, by mistake, was described by a name which was not her real name, and which was one she had never assumed or been known by:—Held, that the legal estate did not pass to her by the mortgage, whatever its operation in equity, and that she could not make a good legal title to a purchaser under the power of sale contained in the mortgage. *Burton* v. *Dougall*, 30 Ont. R. 543.

MUNICIPAL CORPORATIONS.

I. APPROPRIATION OF FINES.

—Conviction—Certorari.]

See FINES AND PENALTIES.

II. BUSINESS TAX.

—By-law—Annual tax—General terms—Application to railway company—29 V., c. 57, s. 21, s.s. 4 (Can.).]—The following by-law: "An annual tax will be and the same is hereby imposed, and shall be paid every year by each person or society of persons being merchants or traders, by retail, and generally on all trades, manufactures, occupations, business, arts, professions or means of profit or subsistence, whether herein enumerated or not, which are now, or which may hereafter be done, exercised or in operation in the said city, for themselves, or as agents for others, and upon all other persons, by whom they are or shall be car-

ried on, exercised, or put in operation in the said city at the rate of $30 for each $400 of the annual value assessed upon site occupied by every such person or society of persons, for the purposes above mentioned, and at the same rate for each larger amount or smaller amount of the estimated value as aforesaid," etc., is legal, in virtue of s.s. 4 of s. 21 of the Statute 29 V., c. 57, and sufficient to allow of the taxation of the company respondent, even if the latter was not specified in the said by-law. *City of Quebec* v. *Canadian Pacific Ry. Co.*, 8 Que. Q.B. 336, affirmed by Supreme Court, 5 June, 1899.

—58 V., c. 57 (P.Q.)—Telephone in private house.]—The Statute 58 V., c. 57 (P.Q.), by which the town of Summerlea was authorized to levy a tax on "every merchant, trader and firm doing business of any kind whatsoever in a store, warehouse, or shop," does not cover a telephone company, which had merely placed a telephone in the hall of a private residence, where instead of exacting the ordinary rental of a telephone from the proprietor of the house, it received in lieu of rental a certain proportion of the fees paid by those using the instrument. *Bell Telephone Co.* v. *Town of Summerlea*, 15 Que. S.C. 64.

III. By-law.

(*a*) *Application.*

—Use of aqueduct—Interpretation of usage.]—When a municipal by-law permits the parties taxed *(abounés)* for an aqueduct to maintain it for their use only, this usage should be interpreted liberally so as to permit the parties to maintain it not only for themselves and families but also for their animals and for other domestic purposes. *Langlois* v. *Turcotte*, 15 Que. S.C. 399.

(*b*) *Infraction.*

—Tax on laundries—Legislative powers—Fine—Costs—Imprisonment—Appropriation of fines—52 V., c. 79, ss, 81, 86, 141, 199 (P.Q.)—59 V., c. 49, s. 6 (P.Q.).]—The provisions of 59 V., c. 49, s. 6, which authorize the City of Montreal to impose a tax on laundries, are within the competence of the Legislature of Quebec. As the by-law imposing this tax punishes by a fine of $40, without mentioning costs, every infraction thereof, and directs that in default of payment of such fine, again not mentioning costs, the delinquent shall be imprisoned for two months, such imprisonment to cease on payment of the fine *and the costs;* the Recorder of the City cannot condemn the delinquent to pay the costs, nor demand that he pay them with the fine to avoid imprisonment, or to obtain his release. As Art. 141, of the former charter of Montreal, provides that the imprisonment of a delinquent shall cease as soon as the fine is paid, without mention of costs, payment of costs cannot be exacted as a condition of his release from prison. It cannot be exacted as a condition of such release that the delinquent shall pay the costs of carrying him to prison, the statutes governing the City of Montreal, and the said by-law not authorizing the imposition of such costs; and when the Recorder has authority to impose the fine, he must himself fix the amount. As Art. 199 of the former charter of Montreal, provides that all fines imposed by the Recorder for infractions of the charter shall belong to the City, it is not necessary for the conviction to state to whom the fine imposed for such an infraction shall be paid. *Lee* v. *DeMontigny*, 15 Que. S.C. 607.

—Offences against by-laws—Summons against Company—Service.]—Section 705 of the Municipal Act, R.S.O. c. 223, as to summary prosecution before a justice of the peace for offences against municipal by-laws, applies to incorporated companies as well as to individuals, as do also ss. 562, 853, and 858 of the Criminal Code, 1892, as to service of summonses, by virtue of the Ontario Summary Convictions Act. *The Queen* v. *Toronto Ry. Co.*, 30 Ont. R. 214.

(*c*) *Passage.*

—Assessment—Farm lands—Mandamus.]
See Mandamus.

(*d*) *Proceedings to Quash.*

—Order quashing conviction—Appeal.]—No appeal lies to the Court of Appeal for Ontario from an order of a Divisional Court, quashing a conviction by a police magistrate for breach of a municipal by-law. *The Queen* v. *Cushing*, 26 Ont. App. 248.

—By-laws—Meeting of council—Notice of introduction of by-laws—Adjournment of meeting—Discretion on motion to quash by-law.]—The notice calling a special meeting of the municipal council of a city at which two by-laws were passed regarding the number of tavern and shop licenses to be granted in the municipality, stated that it was "for the consideration of a by-law relating to tavern licenses:"—Held, a sufficient notice. It was objected that notice of intention to introduce the by-laws should have been given, and that they should not have received their three readings in one day, the council's rules of proceeding so providing, with the exception of cases of urgency; Held, that these were matters of internal regulation, and subject to the decision of the mayor or chairman of the council, and the only appellate tribunal was the council. The Municipal Act provides, sec. 275, that "every council may adjourn its meetings from time to time;" Held, that a meeting of the council might adjourn temporarily, without a formal motion to adjourn, by the consent of the majority of a quorum present; and, even if the adjournment in this case, announced by the mayor, was not by the consent of the majority, the validity of an objection grounded on the absence of such consent would be so doubtful

that the Court should not, in its discretion, quash the by-laws passed after the adjournment. *Re Jones and City of London*, 30 Ont. R. 583.

—**Motion to quash—Time—Service of notice of motion.**]—A summary application to quash a municipal by-law registered under s. 396 of the Municipal Act, R.S.O. c. 223, is "made" within the meaning of s. 399, when notice of the motion is served, the affidavits in support of it having been already filed; it is not necessary that the motion should be brought on for hearing within the time prescribed by the section. *Re Sweetman and Township of Gosfield*, 13 Ont. Pr. 293, approved. *Re Shaw and City of St. Thomas*, 18 Ont. Pr. 454.

—**Prescription—Period.**]—The application to quash a by-law for illegality may be made to the Superior Court or a Judge thereof, or to the Circuit Court, within three months from the time it was brought into force, but after that delay an action or petition to have it quashed is prescribed.—In this case the by-law sought to be quashed was valid. *Prévost* v. *City of St. Jerome*, 5 Rev. de Jur. 395.

—**Expiry of prescribed time—Non-juridical day.**]—An application to quash a by-law made on the day next following the time limited by R.S.B.C. c. 144, s. 89, which time expired upon a holiday, is in time. *Re Nelson City By-law*, 6 B.C.R. 163.

—**Borrowing money—Purchase of electric light plant—Mayor interested in company.**]—A city by-law to borrow money for the purchase of an electric light plant belonging to a company is not invalid merely because the mayor was president of the company at the time of the passage of the by-law, and of the completion of the contract. A statement in a by-law that it shall come into force "on or after" a certain day, is a sufficient compliance with s.s. 1 of s. 68, R.S.B.C. 1897, c. 144. *Semble*, that the Court has power in any case to afford relief where it is shewn that the council has not properly exercised its powers. *Semble*, that a by-law may be quashed on grounds not specified in the rule. *Baird* v. *Almonte*, 41 U.C.Q.B. 415 considered. *Re Arthur and City of Nelson*, 6 B.C.R. 323.

(*e*) *Resolution of Council.*

—**High School trustees—Appointment of.**]—A Board of High School trustees may be appointed by resolution of the Municipal Council having jurisdiction; a by-law is not necessary. *Port Arthur High School Board* v. *Town of Fort William*, 25 Ont. App. 522.

—**Exercise of municipal powers—Grant of exclusive right.**]—A municipal corporation cannot, by resolution, confer the exclusive power of maintaining an aqueduct within its limits, such privilege can only be conferred by by-law. *Marchildon* v. *Société Baril & Cie.*, 15 Que. S.C. 499.

(*f*) *Submission to Ratepayers.*

—**Art. 4529 R.S.Q.—Approval of electors.**]—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*, 29 S.C.R. 135.

—**Construction of aqueduct—Loan—Vote on by-law—Irregularity.**]—On a vote by ratepayers for accepting or rejecting a by-law authorizing the construction of an aqueduct and issue of a loan, it is irregular for the president of the voting to withdraw names after they have been placed on the list of voters and the vote has been taken.—On proceedings to have the by-law declared null because of such irregularity, the Court has jurisdiction to examine the condition of the voting and validity of the votes cast before deciding whether the by-law has or has not been adopted by the electors according to law. *Lageunesse* v. *City of St. Jerome*, 5 Rev. de Jur. 369.

(*g*) *Validity.*

—**Public schools—R.S.O. c. 292, ss. 38, 39—By-law—Alteration of school sections.**]—*Re Powers and Township of Chatham*, 26 Ont. App. 483, affirming 29 Ont. R. 571 and C.A. Dig. (1898), 288.

—**Auctioneer—Regulating and governing—Prohibiting—Markets—Regulation of.**]—The power to regulate and govern auctioneers and other persons conferred on municipal councils by s.s. 2 of s. 495, c. 184, R.S.O. (1887), did not give power to prohibit the exercise of any lawful calling, and a by-law which prohibits an auctioneer from exercising his calling cannot be supported under that subsection as amended by 56 Vict., c. 35, s. 19 (O.), and 57 Vict., c. 50, s. 8 (O.). The power given by s.s. 2 of s. 503 to pass by-laws "For regulating all markets established and to be established," gives no implied power to prevent an auctioneer exercising his calling in the markets, but he may be prevented from selling therein any commodities except those for the sale of which the markets were established. *Bollander* v. *City of Ottawa*, 30 Ont. R. 7.

—**By-law contracting debt—Publication of—Blank dates in—Debentures—Interest—Expropriation—Description—Prior expropriation—Discretion.**]—It is not essential to the validity of a municipal by-law creating a debt, that a day certain for its coming into force should be stated therein when published and submitted to the ratepayers, as s. 384, s.s. 2 of the Municipal Act, R.S.O. c. 223, provides that if no day is named it shall take effect on the day of the passing thereof. Where such a by-law as passed declared the time required by law within which the principal and interest of

the debentures should be payable, but the dates of payment were left blank in the copy of the by-law as published, the Court, in the exercise of its discretion, refused to quash the by-law, which was legal on its face. It is no objection to such a by-law that the enacting clause omits to settle certain specific sums for the payment of the debt and the interest, where the recital and enacting clause read together make clear what is to be done. But where a by-law was passed to raise money to pay for the opening of a street without any settled plan, shewing the exact position of the intended street, or of the land to be taken, or of the cost of the expropriation, and without a by-law being passed providing for the expropriation of the lands, the Court under the circumstances quashed the by-law with costs. *Re Caldwell and the Town of Galt*, 30 Ont. R. 378.

—**Police commissioners—Second-hand stores and junk shops—By-law as to minors—R.S.O. c. 223, s. 484.**]—R.S.O. (1887), c. 184, s. 436 (R.S.O. c. 223, s. 484), which provides that "The Board of Commissioners of Police shall in cities license and regulate second-hand stores and junk stores." does not authorize a by-law to the effect that "no keeper of a second-hand store and junk store shall receive, purchase or exchange any goods, articles or things from any person who appears to be under the age of eighteen years." Such a by-law is bad as partial and unequal in its operation as between different classes, and involving oppressive or gratuitous interference with the rights of those subject to it without reasonable justification. *The Queen* v. *Levy*, 30 Ont. R. 403.

—"**Transient traders**"—**Occupation of premises—Quashing conviction.**]—A by-law of a city provided that "No person not entered upon the assessment roll . . . or who may be entered for the first time in the said assessment roll . . . and who at the time of commencing business . . . has not resided continuously in said city . . . at least three months shall commence business . . . for the sale of goods or merchandise . . . until such person has paid . . . the sum of . . . by way of license":—Held, that the statute under which the by-law was framed, R.S.O. c. 223, s. 583, s.ss. 30 and 31, relates to transient traders *who occupy premises* in a municipality, and that clause (*b*) of s.s. 31 defining the term "transient traders" does not modify the provision as to occupation, and that the by-law was defective and invalid in being directed merely against persons not entered upon the assessment roll and who had resided continuously for three months in the municipality, and was silent as to these persons being in occupation of premises. *The Queen* v. *Applebe*, 30 Ont. R. 623.

—**Taxation—Powers of Legislatures—Delegation of powers—Mode of exercise.**]—A by-law imposing taxation must be complete in itself; it must indicate and name the subjects taxed, and it cannot delegate the power to select them to its officers and assessors, as a delegated power cannot be again delegated, but must be exercised by the body to whom it is given.—Within the limits prescribed by the constitution, the authority of the Parliament and of the Legislatures is absolute, and their power to impose taxation is not restricted by the rules, the mode and the procedure to which municipal corporations are subjected. Therefore, the Legislature has the right to impose taxation upon all callings exercised in the city of Quebec, without naming and specifying them, and also has the power by statute to cover the insufficiency of the by-law in that respect and to give it the same effect as a statute would have. *City of Quebec* v. *Grand Trunk Ry. Co.*, 8 Que. Q.B. 246, affirmed by Supreme Court, June 5th, 1899.

—**Tax for future maintenance of road.**]—A municipal by-law imposing in advance a tax for the cost of the future maintenance of a winter road is void. *Township of Dudswell* v. *Quebec Central Ry. Co.*, 15 Que. S.C. 113.

—**Timber lands—Winter road—Road bordering on cultivated lands—Perpetuity—Servitude—Art. 840 M.C.**]—A municipal by-law allowing the owners of a quantity of timber lands to open a winter road along the whole length of a cultivated tract, in perpetuity and without indemnity to the owner of such land, is illegal as having the effect of creating, without indemnity, a permanent servitude upon the land where such road would pass. —The by-law is also illegal if it permits all or any of the owners of the timber lands to open the road themselves, without requiring the supervision of a municipal officer.—The third paragraph of Art. 840 M.C., which authorizes the Council to pass by-laws "in order to permit the opening of winter roads across all fields or woods, does not authorize the opening of permanent winter roads upon the whole length of a lot, but only temporary roads traversing the fields to reach the woods where work is to be done. *Beauchemin* v. *Corporation of Beloeil*, 15 Que. S.C. 174.

—**Exclusive franchise—Electric tramways—Capacity to contest by-law.**]—A by-law granting an exclusive privilege to a particular company to operate electric tramways for a term of years within a municipality comes within the scope of the authority of a town corporation which has been vested with the right to authorize the construction and operation of tramways upon such terms as it shall see fit.—The contract in question in this case having been confirmed by 57 V., c. 73 (P.Q.), the plaintiffs were without interest to contest the validity of the by-law on which it was based. Moreover, the action was prescribed. *Bell* v. *Town of Westmount*, 15 Que. S.C. 580.

—**Summary conviction—Appeal from—By-law ultra vires—Estoppel—Plea of guilty—Appeal—Discretion of Magistrate.**]—A defendant convicted on summary conviction of an infraction of a city by-law, is estopped from contending on appeal that the by-law is *ultra vires* unless the objection was taken before the Magistrate. He is estopped from appealing on the merits if he pleaded guilty before the Magistrate. *The Queen* v. *Bowman*, 2 Can. Cr. Cas. 89, 6 B.C.R. 271.

—**Electric Co.—Exclusive franchise—Restraint of trade—B.N.A. Act, s. 91, s.s. 2—58 V., c. 69, s. 24 (P.Q.).**]

See CONSTITUTIONAL LAW, IV. (*b*).

—**Statute—Authority to pass by-laws—Difference between English and French versions—Interpretations—Penalty.**]

See CONSTITUTIONAL LAW, II.

—**Tax by-law—Annual tax—General terms—Application to railway Co.—59 V., c. 57, s. 21, s.s. 4 (Can.).**]

See hereunder, II.

IV COMMITTEE OF COUNCIL.

—**Power of council to investigate account—Delegation of power to committee—Judicial functions—Prohibition.**]—The council of a municipal corporation has power to investigate and inquire into an account rendered to the corporation and may lawfully delegate its power so to do, to a committee named by it; and in order to empower such committee to lawfully inquire into an account, it is not necessary that any charge or accusation specific or other, should be made against the person presenting the account.—Such committee of inquiry and investigation does not possess the powers of a judicial tribunal, and the issue of a rule by it against a person, declaring him in contempt of the committee, and ordering that he be imprisoned until he appear and give testimony before the committee, is in excess of its powers, and null and void.—Persons composing a committee of inquiry who exceed their powers and seek to exercise judicial functions, cannot invoke the fact that they do not by law constitute a Court, as an answer to a proceeding to have them prohibited from acting as a court and usurping judicial powers. *Lussier* v. *Corporation of Maisonneuve*, 15 Que. S.C. 45.

V. CORPORATE LIABILITY.

—**High schools—Pupils from adjacent municipality—Municipal corporations—Municipal council—Mandamus.**]—Under its Act of Incorporation, 47 V., c. 57 (O.), the town of Port Arthur has the same rights and powers in regard to the organization and maintenance of high schools as other incorporated towns. By 60 V., c. 14, s. 73 (O.), it is enacted that "the municipal council . . . shall pay for the maintenance of pupils . . .:—Held, that the municipal corporation and not the individual members of the council are liable. Judgment of Falconbridge, J., ordering the town of Fort William to pay to the Port Arthur High School Board a proportion of the cost of maintenance of the high school in respect of pupils residing in the town attending the high school affirmed, but that part thereof directing a mandamus to the mayor and councillors of the town to pass a resolution to the treasurer to pay the amount struck out as unnecessary. *Port Arthur High School Board* v. *Town of Fort William*, 25 Ont. App. 522.

VI. COUNCIL.

—**Action against councillor—Disqualification—Re-election.**]—When a Municipal Councillor, proceeded against by *quo warranto*, on the ground that while Councillor and Mayor he had had contracts with the Corporation and received moneys thereon, has controlled the proceedings against him, and paid the costs before entry thereof into Court, resigned his seat, which resignation was accepted by the Council, his seat declared vacant and the contracts cancelled, the disability for which he could be attacked disappeared, the law not fixing any limit of time during which he would remain disqualified. After these formalities defendant was again eligible to be a councillor, and could be nominated by the council; therefore, a second writ of *quo warranto* issued against him, the application therefor setting up the same reasons as those mentioned above, and in addition charging fraud and connivance between the other members of the council and the councillor so nominated, will be dismissed, especially where such fraud and connivance does not exist. *Laudry* v. *Tudd*, 14 Que. S.C. 188.

—**Qualification—Vente à réméré—Resolutory condition—Quo warranto—Arts. 1079, 1546, C.C.—Art. 283, M.C.**]—A municipal councillor who, during his term of office, has sold with right of redemption (*vente à réméré*) the immovable on which he qualified for election, may be removed from his seat by writ of *quo warranto*, such a sale, if made under a resolutory condition, taking effect from the date of the contract, subject to be resiliated on the happening of the stipulated event, and it makes no difference if, after the issue of the writ, the councillor exercised the right of redemption reserved. *Berthiareme* v. *Pilon*, 14 Que. S.C. 524.

—**Procès-verbal—Prescription—Petition—Appeal—Arts. 100, 1061, M.C.**]—A petition to quash a *procès-verbal* is not prescribed by lapse of more than thirty days between date of coming into force of *procès-verbal* and date of presentation to the Court of the petition, if it has been served within thirty days. Semble:—It is doubtful whether "injustice" is a ground of petition under Art.

100, M.C., or should be raised by appeal under Art. 1061, M. C. *Corneau* v. *Ste. Edwidge de Clifton*, 15 Que. S.C. 405.

—Appeal from local corporation—Expenses of councillors—Order for payment.]—See APPEAL, I.

—Procès-verbal—Petition to quash—Art. 100 M.C.—56 V., c. 43, s. 1 (P.Q.)—Costs.]

See COSTS, XXIII. (*e*).

VII. DITCHES AND WATERCOURSES.

—Ditches and Watercourses Act (Ont.)—Owner of land—Declaration of ownership.]—A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under the Ditches and Watercourses Act, 1894, of Ontario. *Township of Osgoode* v. *York*, 24 S.C.R. 282 followed.—If the initiating party is not really an owner the filing of a declaration of ownership under the Act will not confer jurisdiction. *Township of McKillop* v. *Township of Logan*, 29 S.C.R. 702.

—Ditches and Watercourses Act (Ont.)—Failure to comply with award—Action—Purchaser from party to award.]—No action lies to recover damages because of failure to comply with an award made under the Ditches and Watercourses Act; the remedy, if any, being under the Act itself. The purchaser of land from an owner who was a party to proceedings under the Act in respect of that land is entitled to enforce the award. *Dalton* v. *Township of Ashfield*, 26 Ont. App. 363.

—Award—Engineer—Jurisdiction—Omissions—Declaration of ownership—Friendly meeting—Directory provisions—Waiver.]—The landowner who initiated the proceedings under the Ditches and Watercourses Act, 57 V., c. 55, upon which the Township engineer acted in making an award, had not filed a declaration of ownership pursuant to s. 7, although he was in fact the owner of the land mentioned in the notice as belonging to him, and had not caused a "friendly meeting" to be held pursuant to s. 8, before filing his requisition. The plaintiff, whose lands were affected by the award, contended that the filing of the declaration and the holding of the meeting were acts essential to the jurisdiction of the engineer attaching:—Held, that the provisions of ss. 7 and 8 should be treated as directory only; Held, also, following *Moore* v. *Gamgee*, 25 Q.B.D. 244, that the plaintiff's objections were such as could be waived, and had been waived by her appearing before the engineer and contesting the right of the initiating landowner to have the ditch made on her land and at her expense, without objecting to the engineer's jurisdiction; Held, also, s. 24 of the Act applied so as to validate what was done by the engineer, in spite of the omissions. *Maisonneuve* v. *Township of Roxborough*, 30 Ont. R. 127.

—County council—Watercourse—Procès verbal—Jurisdiction—Homologation—Appeal to Circuit Court—Notice—Arts. 16, 758, 761, 878, 886, M.C.]—Parties interested had, by petition, requested the Corporation of the County of Vaudreuil to take charge of the works on a watercourse—which had already been under control of a local corporation by a homologated *procés-verbal* but the deed of homologation could not be found—claiming that it was a watercourse of the county, and the county council, granting the request, appointed a special superintendent to visit the place and prepare, according to the requirements of the case, one or more *procès-verbaux* regulating and determining the work to be done for the proper flow of the waters mentioned in said petition. The superintendent went to the place and prepared a *procès-verbal* regulating the work not only on the watercourses so mentioned, but also of two others as affluents of the first. This *procès-verbal* was homologated with certain alterations, by the county council, but on appeal to the Circuit Court it was maintained as originally prepared. An assessment roll, based on the *procès-verbal*, was afterwards prepared and homologated:—Held, that the appeal to the Circuit Court on the merits of certain amendments made to the *procès-verbal*, and without the question of its nullity having been raised, did not prevent it being attacked on that ground if it was absolutely void, and if the county council had, in homologating it, exceeded its functions; and that the *procès-verbal* was radically void because the resolution of the county council had ordered the supervision of one watercourse only, that mentioned in the petition, and the superintendent had included two others is *procès-verbal*, and this nullity was not cured by the homologation of *procès-verbal*; Held, also, that these watercourses could not, because of their being joined together, be regarded as one and the same watercourse, and that an affluent of a watercourse, except for the purpose of diverting its waters into the main channel, should be regulated, if not otherwise ordered, by a special *procès-verbal*; Held, further, that a county corporation cannot, unless public notice for the purpose has been given, declare a water-course formerly under control of a local corporation and governed by *procès-verbaux* of the latter, to be a watercouse of the county, and failure to give such notice is not an informality such as Art. 16 M.C. permits the Court to pass over without notice, but it is a fatal informality which produces an absolute nullity. *McCabe* v. *County of Vaudreuil*, 15 Que. S.C. 22.

—Municipal Code, Que.—Cleaning of ditches—Powers of Legislature—B. N. A. Act, s. 91, s.s. 29, and s. 92, s.s. 10.]

See CONSTITUTIONAL LAW, IV. (*a*).

—Ditch uniting watercourses—Arts. 535, 772, 773, 1080 M.C.]—See hereunder, XI.

VIII. Drainage.

—Drainage—Want of repair.]—Where a drain is out of repair and lands are injured by water overflowing from it the municipality bound to keep it in repair cannot escape liability on the ground that the injury was caused by an extraordinary rainfall unless it is shewn that even if the drain had been in repair the same injury would have resulted. *McKenzie* v. *Township of West Flamborough*, 26 Ont. App. 198.

—Outlet—Ontario Drainage Act.]—A drainage scheme under s. 75 of the Drainage Act, 1894, cannot be upheld if the engineer does not make provision for a sufficient outlet for the water dealt with. *Re Township of Raleigh and Township of Harwich*, 26 Ont. App. 313.

—Invalid by-law—Damages—Charging assessed area.]—The municipal council of a township passed a provisional by-law for the construction of drainage works affecting land in three townships, in accordance with the assessment, specifications and estimates contained in the report, upon petition, theretofore made by their engineer. On the matter coming up before the Court of Revision it was found that the petition had not been signed by the necessary number of owners. The council then, without any new petition or engineer's report, altered the report already made, reducing the size and cost of the work, changing the specifications, estimates and assessments accordingly, and passed a by-law for the construction of the works, as in the altered report, in the three townships:—Held, that this by-law was void. *Raleigh* v. *Williams*, [1893] A.C. 540, at p. 550, applied. Where a by-law for the construction of drainage works is void, damages awarded to a landowner on account of injury to his crops caused by the negligent construction of the work are not to be charged against the drainage area assessed for the work, but are chargeable against the initiating municipality. *McCulloch* v. *Township of Caledonia*, 25 Ont. App. 417.

— Branch drains — Separate assessment — Engineer's report.]—Where it is essential for the purpose of draining an area, a drainage work may include such branch drains as may be necessary, and the main drain and branches may be repaired and enlarged in case of necessity under one joint scheme and joint assessment, a separate scheme and separate assessment for the main drain and for each branch not being necessary. Under s.s. 3 of s. 89 of the Municipal Drainage Act, R.S.O. c. 226, the Drainage Referee has jurisdiction, with the consent of the engineer and upon evidence given, to amend the engineer's report by charging against the municipalities for "injuring liability" assessments erroneously charged against them by the engineer for "outlet liability." *Re Township of Rochester and Township of Mersea*, 26 Ont. R. 474.

—Water supply—Execution and maintenance—Procès-verbal—Description of land to be drained.]—When a part only of land is drained by a watercourse, the *procès-verbal* imposing in work of construction and maintenance of the supply on the proprietor of such land should designate specifically the part drained. Thus, the *procès-verbal* imposing upon 16 acres of lots 42*a* and 42*b* of the first concession of Hinchinbrooke the works of the water supply was illegal and had to be set aside as it could only burden those 16 acres with the work and should designate them specifically.—The *procès-verbal* imposing upon land the burden of works for a water supply creates upon this land a permanent charge which has the character of a servitude. *Barrette* v. *Corporation of St. Barthélemy*, 4 Que. Q.B. 92 followed. *McCann* v. *Township of Hinchinbrooke*, 8 Que. Q.B. 149.

— Construction of sewers — Responsibility for flooding of premises.]—A city is not responsible, after having, in good faith, constructed a system of sewerage in accordance with the plans of skilled engineers, if the drains fail to keep underground cellars free from water when such flooding does not depend on improper construction or negligent maintenance of the sewers, and particularly where the premises of the party complaining were erected after the construction of the sewerage system. *A.M.C. Medicine Co.* v. *City of Montreal*, 15 Que. S.C. 594.

—Special assessment for drain—Prescription—Art. 4555 R.S.Q.]

See Limitation of Actions, VI.

IX. Expropriation of Lands.

—Interference with proprietary rights—Abandonment of proceedings—Damages—Public utility—Arts. 406, 407, 507, 1053 C.C.]—Where, under authority of a statute authorizing the extension of a street, a servitude for public utility was established on private land which was not expropriated and the extension was subsequently abandoned, the owner of the land was not, in the absence of any statutory authority therefor, entitled to damages for loss of proprietary rights while the servitude existed. *Perrault* v. *Gauthier*, 28 S.C.R. 241 referred to. *Hollester* v. *City of Montreal*, 29 S.C.R. 402.

— Widening streets — Assessments — Excessive valuation—52 V., c. 79, s. 228 (Que).]—*City of Montreal* v. *Ramsay*, 29 S.C.R. 298, affirming 7 Que. Q.B. 214, C.A. Dig. 1898, 294.

— Arbitration and award — Lands injuriously affected—Compensation—Damages—Interest.]—Compensation for lands injuriously affected in the exercise of municipal powers is in the nature of damages, and interest should not be allowed thereon before the time of the liquidation of the damages by the making of

the award. The distinction in this respect between such compensation and compensation for lands taken, or taken and injuriously affected, considered. *Re Leak and City of Toronto*, 26 Ont. App. 351, reversing 29 Ont. R. 685 (now in appeal to the Supreme Court of Canada).

—Description of land—Procès-verbal—Indemnity—Arts. 906, 908, 912, 913 M.C.]—A municipal corporation should, in expropriating from a ratepayer, observe the formalities prescribed by the Municipal Code, and the *procès-verbal* in expropriation should describe the land to be expropriated.—When an expropriation is ordered, the municipal authorities should make an agreement with the owner to indemnify him or cause the land to be valued according to law, by valuators who act as a court, hearing the parties and their witnesses, and giving their award in writing.—This course should be pursued even when the value of the expropriated land is offset by the advantages resulting from the expropriation, for the matter should be judicially determined.—Even if the land is taken for a front road (*chemin de front*) it is necessary, in order that the corporation should be relieved from paying an indemnity for the expropriated land by virtue of Art. 906 M.C., that the existence of such road should be established by a writing, a resolution or a *procès-verbal*. *Godbout* v. *Corporation of St. Damien de Buckland*, 14 Que. S.C. 67.

—Enlargement of street—Value of land expropriated—Assessment.]—In assessment of the cost of expropriating land taken for the enlargement of a street it is the value of the property at the time the assessment roll is made up that is to be considered and not the value the property had at the time of the expropriation. *Bélanger* v. *City of Montreal*, 15 Que. S.C. 43.

—Indemnity—Vacant land—Fence—Costs—Commission—Remploi.]—In expropriation of vacant land indemnity cannot be granted for the fence surrounding it nor the trees within it, since though these add to the value of the land they cannot be considered in the estimated damages. The Expropriation Commissioners of the City of Montreal, having no power to award as to costs, should refuse the expenses of deeds and their registration, and they should, in this case, refuse to award a commission of 2½ per cent. upon the purchase of other property and reduce the amount claimed for the expense of re-investment (*remploi*) the indemnified owner being himself a real estate agent, and having moreover, a site entirely situated within the residue of the land which was more than sufficient for the erection of buildings for business purposes. *City of Montreal* v. *Baxter*, 15 Que. S.C. 149.

—Taking possession of land—Recourse of owner—Trespass.]—The city, defendant, without the ordinary formalities of expropriation, laid water pipes in a strip of plaintiff's land, removed his fence, and the land was used by the public as part of a street. But these acts did not appear to have been authorised by the council of defendant, and the intention to expropriate the property was abandoned. The plaintiff now claimed the value of the property:—Held, that the acts of the defendant constituted a mere trespass and were not taking possession of the property so as to make the defendant responsible to the owner for the value. *Bélair* v. *City of Montreal*, 15 Que. S.C. 494.

—Failure to expropriate—Liability—Abandoning proceedings.]—The City of Montreal is not liable for damages caused by failure to expropriate lands of which the expropriation has been authorized by an Act of the Legislature, but it is liable, in law, for damages caused by failure to proceed with expropriation proceedings commenced in virtue of said Act. *Guerin* v. *City of Montreal*, 2 Que. P.R. 159.

X. Fire Department.

—Negligence—Damages.]—Though municipal corporations are not bound by law to establish and manage a fire department, yet if they do so they are liable for injuries caused by the negligence of the servants employed by them therein while in the performance of their duties. *Seymour* v. *Township of Maidstone*, 24 Ont. App. 370, distinguished. *Hesketh* v. *City of Toronto*, 25 Ont. App. 449.

XI. Highways.

—Dedication—User—Evidence.]—In order to establish the existence of a public highway by dedication it must appear that there was not only an intention on the part of the owner to dedicate the land for the purposes of a highway but also that the public accepted such dedication by user thereof as a public highway.—In a case where the evidence as to user was conflicting, and the jury found that there had been no public user of the way in question, the Trial Judge disregarded this finding and held that dedication was established by a deed of lease filed in evidence, and this decision was affirmed by the full Court. Held, that as such decision did not take into account the necessity of establishing public user of the locus, it could not stand. Judgment of the Supreme Court of New Brunswick reversed. *Moore* v. *Woodstock Woollen Mills Co.*, 29 S.C.R. 627.

—Damages—Non-repair of highway—Notice of accident.]—The notice in writing of the accident and the cause thereof, referred to in the Consolidated Municipal Act, 1892, s. 531, s.s. 1, as amended by 57 V., c. 50, s. 13 (Ont.), and 59 V., c. 51, s. 20 (Ont.), is not necessary when the accident is the result of non-repair of a highway which two or more municipalities are jointly liable to keep in repair. *Leizert* v. *Township of Matilda*, 26 Ont. App. 1, affirming 29 Ont. R. 98 and C.A. Dig. (1898) 297.

—**Want of repair — Negligence of driver.**]—A highway, in an old and thickly settled district, over which there is much traffic, is out of repair within the meaning of the statute when a large stump is allowed to stand in the highway just at the edge of the travelled way. *Semble:* Where horses are running away without any fault of the driver, and while he is still endeavouring to recover control of them he sustains injury owing to such a defect in the highway, he is entitled to damages. The contributory negligence of the driver of the vehicle in such a case is not an answer to an action for injuries sustained by an occupant thereof, who has in good faith entrusted himself to the driver's care. *Foley* v. *Township of East Flamborough*, 26 Ont. App. 43, reversing 29 Ont. R. 139.

—**Telephone — Poles on street — Supervision of municipality—Interference with public travel.**]—A telephone company having permission by its Act of incorporation to erect poles on the streets of towns and incorporated villages, so as not to interfere with the public right of travel, is not relieved from liability for damages when it plants the poles on the highway in such a way as to become an element of danger to the public, although, as required by the Act of incorporation, the poles are planted under the supervision of the municipality. *Bonn* v. *Bell Telephone Co.*, 30 Ont. R. 696.

—**55 V., c. 33 (B.C.)—By-law — Accident to bridge under corporate control.**]—The appellant corporation having, under 55 V., c. 33, *de facto* taken over the care and control of a certain bridge:—Held, that their acts with regard to it were *primâ facie* competent corporate acts. It would lie on the corporation to shew clearly that any acts done by their officers under their direction were *ultra vires* and illegal, and that conclusion could not be reached merely by reason of their not having passed a by-law under 55 V., c. 33 actually vesting the bridge in them.—In an action to recover damages from them for a fatal accident caused by the breaking down of the said bridge over which a tramcar containing the deceased was running; Held, that the finding of the jury that an act done by their officer had materially weakened the beam which afterwards broke amply justified a verdict against them; and the liability, if any, of the tram company for passing an extraordinarily heavy weight over it not having been before the jury, could not be raised in appeal. *City of Victoria* v. *Patterson, City of Victoria* v. *Lang* [1899], A.C. 615, affirming 5 B.C.R. 628, C.A.Dig. 1898, 301.

—**Turnpike road — Accident — Responsibility of municipal corporation—Art. 751 M.C.**] — A municipal corporation is not responsible for an accident which occurs on a road within the limits of the municipality, but which road is under the control of a turnpike company. *Brunet* v. *Corporation de la Pointe Claire*, 14 Que. S.C. 278.

—**Use of public street by railway—Liability for accident on rails.**]—The City of Montreal permitted the Canadian Pacific Railway Co. to place rails upon a public street where there was much traffic. The rails being on sleepers were raised above the level of the street some eight or nine inches and ended abruptly, without any guard or protection at the extremity of the line. In winter the rails were not in use and were covered over with a mass of snow:—Held, that under these circumstances the city was liable for injury to a person who, not knowing of the presence of the rails, drove his wagon against them at the end, and could not escape this liability by claiming that recourse should be against the railway company, the owners of the rails. *Prévost* v. *City of Montreal*, 15 Que. S.C. 39.

—**Damage for personal injuries—Weak constitution of person injured — Force majeure.**] — Although the damages resulting from personal injuries may have been considerably increased owing to the weak constitution of the person injured, the party in fault is nevertheless responsible for all the damages suffered, plaintiff's earning capacity at the time of the accident being duly taken into account. *Loranger* v. *Dominion Transport Co.*, Q.R. 15 S.C. 195, followed.—The fall of an unusual quantity of snow does not constitute *force majeure*, if it be allowed to remain on a leading thoroughfare for five or six days, and no path be cleared on the sidewalk, which in this instance was twelve feet wide. *Leclerc* v. *City of Montreal*, 15 Que. S.C. 205.

—**Municipal winter roads — Maintenance—Responsibility—Action in warranty.**]—The plaintiff, meeting a sleigh on a front winter road, and the road being a single track of about three feet wide, was obliged to put his horse into the deep snow, and the horse in plunging therein was injured. The fences had also been left standing on both sides of the road, which is curved at that spot; and no meeting places had been provided for as required by law:—Held, that under these circumstances, the municipal corporation was liable for all damages suffered by the plaintiff, for not having given any attention to the road and having permitted it to remain in such a dangerous and illegal state.—The municipal corporation has a recourse in warranty against the proprietor, opposite whose property the accident occurred, since it has been settled by the jurisprudence that the legal right to bring an action in warranty on an action for a tort, *quasi délit*, fully exists.—The road on which the accident occurred being a front road, the primary duty of laying it out is on the proprietor liable to work on it, and not on the municipal officers. Consequently, the defendant in warranty cannot be exempted from liability by saying that he was under no obligation to

construct any meeting place according to law until it had been localised by the municipal officers.—Persons liable to perform work required by the provisions of the municipal law, are always considered *in mord* to perform such work. *Rousseau* v. *Corporation of St. Nicholas*, 15 Que. S.C. 214.

—Statute, interpretation of—57 V., c. 57, s. 1 (P.Q.)—Properties "fronting" on lines of streets—Widening or opening.]—Where it is clear on the face of the statute that it was intended to govern and provide for a particular state of facts, the Court will so modify the ordinary meaning of words as to permit such intention to have effect. Therefore, in 57 V., c. 57, s. 1, the word "widening," in reference to Milton street being used evidently by inadvertence for "opening," the statute should be interpreted so as to give effect to the intention of the Legislature. *Joseph* v. *City of Montreal*, 10 Que. S.C. 531, referred to.—The words "properties fronting" on the line of a street includes properties adjoining or contiguous to the line of the street on any side, although the buildings thereon front on a street intersecting the other, and the properties are only bounded on the side line by the street first mentioned. *Watson* v. *Maze*, 15 Que. S.C. 268.

— Water-courses — Ditches — Roads — Procès-verbal, etc.—Arts. 867, 874, 773, 772, 535, 475, 1080 M.C.]—A rural inspector may be appointed a special superintendent unless disqualified under Art. 874 M.C.—Two rural inspectors may be appointed "joint special superintendent," although the resolution naming them does not so style them.—If appointed as joint special superintendent, they must act together in giving notices, holding meeting, etc.—If no delay has been fixed by the council for the making of their report, it must be made within thirty days, under Art. 884 M.C.—It is doubtful whether a ditch located on the side of a highway forms part of the road under Art. 773 M.C. (and as such is subject to Art. 1080 M.C., and by-law under 535 M.C.), if it be a section uniting watercourses regulated by Art. 772 M.C. *Semble*, it would depend upon whether its original construction and primary object was to receive surface water from the highway, or water from watercourses draining lands higher than the highway. *Comeau* v. *Ste. Edwidge de Clifton*, 15 Que. S.C. 405.

—Removal of snow from streets—Slope from centre of street to sidewalk—Accident.]—The plaintiff, a woman aged seventy-nine years, while passing unassisted along a narrow street at night, during a spring thaw, fell on a crossing which sloped from the centre of the street towards the sidewalk, and fractured her thigh:—Held, that the City of Montreal is not obliged to remove the snow from narrow streets, such removal being practically impossible, and the occurrence of slopes from the centre of the street to the sidewalks being a necessary consequence of the non-removal of the snow and of climatic conditions, the city was not responsible for the accident. *Bonin* v. *City of Montreal*, 15 Que. S.C. 492.

—Maintenance—Repairs—Arts. 788, 793 M.C.]—Municipal corporations are bound to maintain the roads under their control in the condition required by law, and are responsible for all damages resulting from the non-execution of such obligation.—Courts are not disposed to apply literally the provisions of the law and to hold that municipal corporations must, at all times, regardless of the season of the year and of special circumstances, keep and maintain the roads under their control in perfect condition, but the spirit of the law must be observed.—Although a road is repaired in May or June, if the hole, which caused the accident, was allowed to form in the course of summer and to increase in size until, under the effects of the fall rains, it has reached proportions which made it dangerous, there is evidence of negligence under such circumstances, and the corporation will be held responsible. *Duclos* v. *Township of Ely*, 5 Rev. de Jur. 177.

—Dedication—Extinction—Non-user by public—Alteration by Commissioners—Removal of obstruction—59 V., c. 21, s. 22 (N.B.).]—The right of the public to the use of land dedicated by the owner, as a public highway, and used by the public as such for a number of years, cannot be extinguished by act of the owner, nor can such right be lost by the public by non-user of the highway.—Highway Commissioners altering the course of a highway are held to an exact compliance with their statutory authority.—Authority under The Highway Act, 1896, 59 V., c. 21, s. 22, to sell the work of removing an obstruction upon a public road is not limited to a case where the owner of the obstruction is unknown. *Winslow* v. *Dalling*, 1 N.B. Eq. 608.

—Liability for non-repair—Negligence—Ice and snow on sidewalk.]—The plaintiff's claim was for damages for an injury sustained by falling upon an icy slope which had formed on a sidewalk in the City of Winnipeg, adjacent to a public well, supplied with a pump, which was daily used by a large number of people. The well was one of about sixty provided by the Corporation, and maintained at its expense, and a number of men were employed by the Corporation, whose duty was to visit the wells from time to time during the winter and remove or reduce the mounds of ice on the sidewalks and around the pumps caused by the freezing of the water that dripped from them or was spilled from pails while being carried away. One of these employees was on the spot on the very day of the accident, and did not consider it necessary to do anything for the purpose of making the place more safe for

foot passangers, and other employees of the City, whose duty it was to report unsafe conditions, had passed the place on the same day and made no report on it. The Trial Judge found on the evidence that the ice-mounds and slope on the sidewalk had been caused, not from the water that dripped from the pump or was spilled in filling pails there, but by the spilling of water from the pails while being carried along the sidewalk or in the filling of other vessels, and so were the result of negligence of the part of other persons and not of any faulty construction of the pump or its approaches; and that the place where the accident happened was not shewn to have been at the time more unsafe than many other spots on the sidewalks are frequently rendered by local conditions when freezing and thawing follow each other at short intervals.—Held, that the mere allowance of the formation and continuance of obstructions or dangerous spots in the highways due to accumulations of snow or ice may amount to non-repair, for which the Corporation would be liable, but in every such case the question to be determined is whether, taking all the circumstances into consideration, it is reasonable to hold that the municipality should have removed the danger. *City of Kingston* v. *Drennan*, 27 S.C.R. 46 followed. That in the present case it would not be reasonable to hold the defendants liable, as there were so many such wells in the city usually placed at street crossings and in constant use; and to keep the sidewalks near them completely free from ice or roughened by chopping or sprinkling some substance upon them would have been well-nigh impossible. *Taylor* v. *City of Winnipeg*, 12 Man. R. 479.

—Highway authority—Negligence—Respondeat superior—Contractor or servant—Misfeasance or nonfeasance.]—A Municipal Corporation which had statutory power to enter lands and take, without payment, gravel for its roads, let a contract for grading and gravelling a road within its limits, which contained no provision as to where the gravel was to be obtained. The contractor entered adjacent private property and took gravel from a pit thereon in such manner as to undermine a large tree standing close to the road allowance, which, by reason thereof, afterwards fell upon and killed plaintiff's husband who was driving on the road. To be assured of its quality, the taking of the gravel was superintended by the Municipal Road Inspector. The jury found that the excavation was done by the order or permission of the Corporation, and that, irrespective of who caused the excavation, the subsequent condition of the tree was a dangerous nuisance to the highway, of which the Corporation had notice.—Held, that the Corporation was responsible for the act of the contractor in undermining the tree, to the same extent as if he was a labourer acting under the orders of the Road Inspector or the Board of Works.—If one employs a contractor to do a work not necessarily a nuisance, but which becomes so by reason of the manner in which the contractor has performed it, and the employer accepts the work in that condition, he becomes at once responsible for the nuisance.—He who knowingly maintains a nuisance is as liable for its consequences as he who created it. *Steves* v. *District of South Vancouver*, 6 B.C.R. 17.

XII. Illegal Acts and Contracts.

—Impossibility of performance by act of party—Member interested in sub-contract—Refusal to carry out sub-contract — Liability.] — The defendant, who was a member of a municipal corporation, and who would have been disqualified, under s. 80 of the Municipal Act, R.S.O. c. 223, from entering into or being interested in a contract with the corporation, entered into a sub-contract to do the brick and mason work of a town and fire hall which was being erected for the corporation under a contract which contained a provision that the contractor should not sub-let the work or any part thereof without the consent in writing of the architect and corporation. The defendant agreed to resign his seat—though this formed no part of his written contract—which he afterwards refused to do on the ground that the corporation declined to accept him as a sub-contractor, and a resolution was passed by the corporation to that effect, whereupon the defendant refused to perform the contract:—Held, that the defendant by his omission to resign had not done all in his power to enable him to perform the contract, and was precluded thereby from setting up the resolution of the council as an answer to his non-performance, and was liable for the damages sustained by the plaintiff. *Ryan* v. *Willoughby*, 30 Ont. R. 411.

XIII. Licenses.

—Warehousemen—Agents—57 V., c. 11 (P.Q.).]—Warehousemen are obliged to take out a license under 57 V. (Q.), c. 11, s. 3, as "agents." S. 4 of the above Act, which says that persons engaged in trade or manufacture, who have not more than $500 of stock belonging to them, may, on making a solemn declaration to that effect, be exempted by the Provincial Treasurer, applies to those engaged in trade mentioned in s. 2, who deal in the buying and selling of goods, but does not apply to those mentioned in s. 3, who, though they may be doing a large business, are not dealing with any goods belonging to themselves. In any event, in order to obtain exemption under the statute it is necessary to make a solemn declaration establishing the facts upon which exemption is claimed, and to deposit the same with the collector of provincial revenue. *Lambe* v. *Austin*, 15 Que. S.C. 251.

—Business taxes—Trading licenses—Arts. 582 and 583a M.C.]—The plaintiff kept one or more shops, and also boxes and wheelbarrows, from which he sold personally, or by

means of his employees, objects of piety in the municipality of Ste. Anne. These boxes or wheelbarrows were stationed on a certain platform which the corporation had constructed at its own cost, expressly for that purpose. He took licenses for his trade, both for himself personally, and for each such employee, and paid for all these licenses. He contended by this action that the license fees exacted from him were beyond those permitted by law, and that payment of only one license fee should have been required from him:—Held, that the power of municipal corporations to require the taking of licenses by persons desiring to exercise certain callings, is given with a view to the better maintenance of order therein. This object would be in a great measure defeated if under a license to one person, an unlimited number of employees could act. Therefore, under the circumstances of this case, the defendants were justified in exacting that a license should be taken by each party intending to sell, especially so when each seller occupied a separate place on the platform erected by the defendants. *Richard* v. *Corporation of Ste. Anne de Beaupre*, 14 Que. S.C. 432.

—Trader— Special business.]—A municipal corporation has the right to impose on traders carrying on business within the municipality the obligations of taking out licenses for such business, but cannot impose this obligation on persons only, who carry on a particular kind of business, to the exclusion of others. *Corporation of Saint-Ambrose* v. *Godin*, 5 Rev. de Jur. 321.

—Liquor laws—Action—Discretion of members of council—Refusal to confirm certificate—Liability of corporation.]—See ACTION, XXI.

—Action for price—Demurrer—Acknowledgement of liability—Preuve avant faire droit.]—See PLEADING, V.

—License Act—Action for penalties—Form of action.]

See PRACTICE AND PROCEDURE, XLIX.

XIV. LIGHTING CONTRACTS.

— Electric lighting — Contract.] — Where a contract was made by a company for the electric lighting of a city for a named number of nights before a fixed date at a fixed rate per light per night, there not being as many as the named number of nights before that date, and the company did not supply lights the nights that there were, and were not prevented from doing so by the city, it was held that they were not entitled to recover at the contract rate for the named number or for more than the nights actually lighted. *Stratford Gas Co.* v. *City of Stratford*, 25 Ont. App. 109.

XV. LOCAL IMPROVEMENTS.

—Frontage System—Appeal—Court of Revision—County Court Judge.]—The municipality in 1894 by by-law adopted the local improvement system as to the making of sewers, and also passed a general by-law for the purposes mentioned in s.s. 1 of s. 612 of the Municipal Act then in force, 55 V., c. 42 (O.). The appellant's lands fronting on a street along which the municipality proposed to make a sewer, were, with the other lands so fronting, assessed at a uniform rate per foot frontage, for a portion of the cost of the sewer, and certain lands not fronting on the street, but which would derive benefit from the sewer, were assessed for the remainder of the cost. The appellant appealed against his assessment to the Court of Revision, but his appeal was dismissed, and he then appealed to the County Court Judge, who found that the lands in question would be benefited by the proposed sewer, but that the assessment was too high, and he reduced it, directing that the amount struck off should be assessed *pro ratâ* over the other properties included in the assessment:—Held, that he had no jurisdiction to do so; and prohibition awarded against the enforcement of his order. Having regard to the provisions of the Municipal Act, R.S.O. c. 223, ss. 664-685, relating to local improvements, the method of assessment, in such a case as this, is to determine what proportion of the cost the land fronting on the street shall bear, and what proportion the land not so fronting shall bear, and assess the proportion appertaining to each class according to its frontage, and not according to the proportion of benefit received by each parcel or lot of land. *Re Robertson and City of Chatham*, 30 Ont. R. 158.

—Enlargement of streets—Assessment of cost—Benefit — Cost of expropriation.] — When a statute directs that a certain proportion of the cost of enlarging a street shall be paid by the owners of the land abutting on it, it is not necessary for the Commissioners to assess this cost equally on each side, but they should take into account the benefit accruing to the owners by the enlargement; and if of opinion that one side has benefited more than the other, they should increase the proportion to be assessed on such side accordingly. *Bélanger* v. *City of Montreal*, 15 Que. S.C. 43.

XVI. MEETINGS OF COUNCIL.

—Publication of notice—Interval—Art. 238 M.C.] —Seven clear days must be given between the date of publication of notice of meeting of council, and the day of meeting, under Art. 238 M.C. *Comeau* v. *Corporation of Ste. Edwidge de Clifton*, 15 Que. S.C. 405.

XVII. MUNICIPAL ELECTIONS.

—Returning officer—Refusal to give ballot paper to voter—Malice or negligence.]—A returning officer at a municipal election refuses at his peril to give a ballot paper to a person on the voters' list claiming the right to vote, and willing, if required, to take the prescribed oath. The officer's refusal in such

case is a wilful act within the meaning of section 168 of The Consolidated Municipal Act, 1892, and renders him liable to the voter for the statutory penalty without proof of malice or negligence: *Johnson* v. *Allen*, 26 Ont. R. 550, not followed; *Wilson* v. *Manes*, 26 Ont. App. 398, affirming 28 Ont. R. 419 and C.A. Dig. (1897), 234.

—Nomination of candidate—Lapse of hour—Municipal Act (Ont.).]—The provision in s.s. 2 of s. 128 of the Municipal Act, R.S.O. 223, which provides for the closing of the meeting for the nomination of candidates for municipal offices after the lapse of one hour, only applies where no more than one candidate is proposed; s.s. 3 applying where more than one candidate is proposed, in which case no time limit is imposed. *Re Parke*, 30 Ont. R. 498.

—Election to council—Qualification—Valuation of property—Quo warranto.]—The valuation on the roll of municipal values is not conclusive to establish the value of an immovable on which a municipal councillor claims to qualify. As under the Towns Corporation Act, R.S.Q. Art. 4216, a councillor must, for at least twelve months previous, have possessed immovables worth $400 over and above all charges and hypothecs thereon, it is necessary in this case to deduct from the immovable in question :—1. The amount remaining due on a tax for drains, payable by annual instalments during forty years. 2. The additional hypothec stipulated for by the creditor in agreement for a loan, but not a hypothec agreed to for a guarantee of compound interest which was not due, and to guarantee the repayment of insurance premiums, it not being proved that they had been paid. In the appreciation of changes and hypothecs burdening the immovable, regard must be had to the amount really due and not to that which appears on the register, and when the matter comes up on a writ of *quo warranto* it is of little importance that the partial payments by which the amount of the changes have been reduced were made within the twelve months as the qualification of the defendant in such case at the time the writ issued should be enquired into:—*Semble*. After the expiry of the delays for contesting a municipal election the qualification of a councillor cannot be attacked on a writ of *quo warranto* for reasons that could have served as a ground for contesting the election. *Chalifoux* v. *Goyer*, 14 Que. S.C. 170.

—Municipal councillor—Eligibility—Contestation of Election—Quo warranto—Arts. 208, 283, 346 M.C.]—The person seeking election as a municipal councillor must be an elector of the municipality, otherwise his election may be contested on this ground; but he is not required to maintain the qualification of a municipal elector during the whole time of his membership in the council if he possesses the other required conditions of eligibility. An interested party cannot, after the expiration of the delays for contesting a municipal election, have the seat of a councillor declared vacant by means of a writ of *quo warranto* invoking a want of qualification not actually existing at the time the writ issued, even though the non-qualification had existed at the time of the election which such party may have had good grounds for contesting before the proper Court under the provisions of Arts. 346 *et seq.* M.C. *Allard* v. *Charlebois*, 14 Que. S.C. 310.

—Municipal Councillor — Qualification — Quo warranto—Consent to election—Discretion—Art. 987 C.C.P.—Art. 283 M.C.]—The qualification of a municipal councillor may be contested by proceedings in *quo warranto*, under the provisions of Art. 987 *et seq.* C.C.P., notwithstanding the fact that the cause of disqualification existed at the time of the election.—The petition against an election, which is the remedy given by Arts. 4275 *et seq.* of the Municipal Corporations Act, does not prevent recourse to the writ of *quo warranto*.—Upon application for the issue of a writ of *quo warranto* the Court can only exercise the discretion which can be exercised in England.—A person who participated in the election of a councillor and himself proposed him for election knowing at the time that he had not the qualification required by law, has acquiesed in his nomination and cannot afterwards complain of his want of qualification. *Limire* v. *Neault*, *Lemire* v. *McClay*, *Lemire* v. *Turcotte*, 15 Que. S.C. 33.

—Contested election—Security—Qualification of surety—Copy of petition—Variance—Grounds of contest.]—The security on the contestation of a municipal election should be for all the costs of the contest and not for a fixed sum. —If there is only one surety it is not necessary for the bond for security to designate the immovable on which the surety qualifies. It is for the defendant who attacks the security to establish that the surety has not the necessary qualifications and the security will not be rejected merely because the affidavit of justification does not shew that he had them.—Though the copy of the petition served on defendent does not exactly conform to the original the petition should only be rejected if the variance has caused some prejudice to defendant, and he cannot be prejudiced if the difference only relates to something which it was useless to insert in the original.—It is sufficient for the petition to indicate the grounds on which the election is attacked and it will not be dismissed merely because the particular facts on which the petitioner intends to rely are not set out in detail; but if the defendant demands these details the petitioner must supply them. *Germain* v. *Hurteau*, 15 Que. S.C. 614.

—Qualification of elector—Real estate—Son of owner—Farmer's son.]—The son of an owner of land, to be a voter, may reside elsewhere than on the immovable which qualifies his

father provided he resides with the latter.—The son of a farmer must have worked for a year on the land by which his father qualifies. One who claims on his capacity of farmer's son to be placed on the list, but who has not fulfilled the above condition, cannot be placed on it if he has not made good his title of owner's son which gives him a right to be there. *Drouin* v. *Parish of Sainte Monique*, 5 Rev. de Jur. 243.

—B.C. Municipal Clauses Act—Alderman—Property qualification of.]—A person to be qualified for alderman for Victoria City must be the owner in his own right of property of the clear unincumbered value of at least $500.00 during the whole period of the six months preceding nomination. The period prescribed by section 86 of the Municipal Elections Act for taking proceedings by way of election petition or *quo warranto* does not apply to a *qui tam* action brought under s. 20 of the Municipal Clauses Act. *Falconer* v. *Langley*, 6 B.C.R. 444.

—Electoral list—Confirmation by council—Appeal—Costs.]—See COSTS, XXIII. (*e*).

See hereunder, III. (*f*).

XVIII. NEGLIGENCE.

—Negligence in exercising statutory powers—Right of action—Arbitration—Municipal Act (Man.), s. 665—Liability for negligence of servant.]—The plaintiff claimed damages in an action against the defendant municipality for injury caused to his land and crops by the negligent and wrongful construction of a ditch by the corporation, in consequence of which water, diverted from its natural course and collected in the ditch, overflowed upon plaintiff's land. This work had been done under a by-law simply authorizing the expenditure of money upon the ditch in question, which was dug wholly upon land under the control of the municipality. Held, that such a by-law could not make lawful an act causing damage by flooding private lands; and that an action will lie against a corporation for doing what the Legislature has authorized, if it be done negligently so as to cause damage to the plaintiff, the recovery by arbitration under s. 665 of The Municipal Act, being confined to any damage necessarily resulting from the exercise of such powers; and it makes no difference that the corporation exercised proper care in the selection of its servants and agents if they acted within the scope of their employment: *Atcheson* v. *Portage la Prairie*, 9 Man. R. 192, followed. *Raleigh* v. *Williams*, [1893] A.C. 540, distinguished. *Foster* v. *Municipality of Lansdowne*, 12 Man. R. 416.

—Notice of action—Art. 793, M.C.—Maintenance of roads—Proximate cause—Imprudence of person injured.]—See NEGLIGENCE, XV.

XIX. OFFICERS AND SERVANTS.

—Principal and surety—Bond—Municipal treasurer—Audit—Representations.]—The treasurer of a county for a number of years embezzled county funds and by manipulation of his books deceived the county auditors who from year to year reported in good faith that his accounts were correct, and the council in good faith adopted the reports. While the treasurer was in fact in default to a large amount, the defendant, who was a ratepayer resident in the county and a relative of the treasurer, became at his request one of his sureties, and at the time was told in good faith by a member of the council and some of the county officials that the treasurer's accounts were correct:—Held, that the auditors' reports so adopted by the council were not implied representations by the council, the incorrectness of which discharged the defendant.—Held, also, that the statements made by the member of the council and the county officials did not bind the council, and that even if they did, having been made in good faith, they formed no defence. *County of Simcoe* v. *Burton*, 25 Ont. App. 478.

—Taxes—Arrears—Collector's roll—Distress—Illegality—Corporation's liability.]—A municipality is responsible for the acts of its officers in illegally placing arrears of taxes on the roll of a collector and the subsequent distress therefor. *Caston* v. *City of Toronto*, 30 Ont. R. 16, affirmed 26 Ont. App. 459.

XX. PUBLIC BUILDINGS AND WORKS.

—Payment of cost—Order of council.]—When a building belonging to the City of Montreal has been erected or repaired the city, which has benefited by the work, cannot escape from the obligation to pay for it by pleading that it was not ordered or approved by the city council, and that a payment is only legal when made with the approbation of the council and on the certificate of the treasurer to the effect that he has funds that can be so appropriated. *Thibault* v. *City of Montreal*, 14 Que. S.C. 151.

—Public market—Weigh-scales—Construction of grant.]—In 1813, pursuant to Crown license, T. erected on public land in the city of Fredericton a public market house and public weigh-scales in connection therewith. The scales were kept in use until 1874, when they were voluntarily removed by their then owner. In 1816 the market building was sold by T. to the defendants, and in 1817 the land on which it and the scales stood was granted by the Crown to the defendants in trust to use the lower floor of the building, and tke land, for a public market place, and the upper floor for a county court house. By 20 V., c. 17, s. 3, it was enacted that the land should be used as a public landing, street and square for the court and market house, and for no other purpose whatever. By s. 4 of the Act it was provided that

nothing therein should in any way affect public rights. In 1898 the defendants sought to erect on the land public weigh-scales to be used in connection with the market. A suit for an injunction having been instituted by the plaintiffs to restrain the defendants from proceeding with the erection of the scales:—Held, that the Crown grant to the defendants contained an implied authority to the defendants to erect upon the land structures necessary or reasonably convenient or useful for the purposes of the market, including weigh-scales, and that this authority was not taken away by 20 V., c. 17. *City of Fredericton* v. *Municipality of York*, 1 N.B. Eq. 556.

—Claim for damages—Arbitration and award—Appeal—Time—Filing—Notice.]

See ARBITRATION AND AWARD, II.

XXI. TAX SALES.

—B.C. Municipal Act 1892, s. 104, s.s. 115, and s. 102—Lien for taxes—Discharge of by sale—Release.]—See ASSESSMENT AND TAXES, XIII.

XXII. WATER SUPPLY.

—Purity of water—Injury to hydraulic elevator.]—The plaintiffs complained that an hydraulic elevator in a building owned by them had been damaged by sand in water supplied from the city works and claimed damages:—Held, per Burton, C.J.O., that as the plaintiffs might have stopped using the water at any time they could not hold the city responsible. Per Osler, and Lister, JJ.A., that the city being bound by law to supply water from their system of waterworks to any inhabitant of the city who applies therefor and complies with the statutory conditions, no contractual relationship arose between the city and the plaintiffs by reason of the application for water and the city's compliance therewith, and that the city were not liable, as upon a breach of contract to supply pure water, for injuries caused to the elevator. *Scottish Ontario and Manitoba Land Co.* v. *City of Toronto*, 26 Ont. App. 345.

—City of Montreal—Water rates—Water furnished by meter for engine—Rate on building containing engine.]—Where water is supplied by the City of Montreal to a ratepayer by meter, for an engine, and paid for at the rate fixed for such supply, the city is, nevertheless, entitled, under its by-laws, to collect the usual water rate based on the rental of the building which contains the engine. *City of Montreal* v. *Henderson*, 14 Que. S.C. 356.

And see NEGLIGENCE, XIII.

NAVIGATION.

—Ice cut on public harbour—Easement of navigation.]—See CONSTITUTIONAL LAW, I.

NEGLIGENCE.

I. ACTION FOR BODILY INJURIES.

—Prescription—When it begins to run—Art. 2262 C.C.]—See LIMITATION OF ACTIONS, III.

II. BUILDINGS AND PREMISES.

—Mill owner—Water stored up by dam—Counterclaim against lower proprietor for backing up water and overflowing land — Easement.] — Plaintiff and defendant purchased their respective mill sites in November, 1892, at an auction sale which took place under a power of sale contained in a mortgage given by the Nova Scotia Land and Manufacturing Co., the former owners, to M. and N. The deeds contained no special grants or reservations of easements. In May, 1897, a dam erected by defendant for the purpose of storing up water for the supply of his mill was carried away, and the water released by the breaking of the dam, with a large quantity of logs, came down the river with great force, and carried away the dam of plaintiff's mill, which was situated a short distance below that of defendant. To the action brought by plaintiff to recover damages for the injury done, defendant counterclaimed damages for the backing up by plaintiff's dam of water on defendant's land in such a way as to interfere with the effective operation of defendant's mill. The evidence shewed that from 1872 until 1875, the two mills were operated by the Nova Scotia Land and Manufacturing Co., but that, in 1875, the dam of the mill purchased by plaintiff, was carried away, and was not rebuilt down to the time of the sale by the mortgagees and the purchase by plaintiff:—Held, that there was no continuous easement apparent and visible to any one inspecting the property; Held, also, that nothing was to be assumed in plaintiff's favour from the existence, at the time of the purchase by him, of a small portion of the frame work of the old top of the dam. Held,

(per Ritchie, J., following *Rylands* v. *Fletcher*, L.R. 1 Ex. 279, 3 H.L. 330), that a mill owner who causes water to be stored up by the erection of a dam, is responsible for its safe keeping. *Hart* v. *McMullin*, 32 N.S.R. 340.

—**Responsibility—Workmen making repairs.**]—Persons executing work or repairs in a house are responsible for damage to furniture and effects therein, caused by the negligence of themselves or their employees. *McDonald* v. *Morrison*, 15 Que. S.C. 143.

—**Dangerous excavation adjoining public thoroughfare—Proximate cause—Damages.**]—In an action brought by plaintiff against defendants for having negligently and improperly suffered an excavation or cellar, adjoining a public thoroughfare in the town of Windsor, to remain open to said street, without any fence, railing or other protection, so as to be dangerous to persons lawfully being upon or passing along said street, so that plaintiff fell into the said excavation or cellar and was injured, the jury found, among other things, that there was negligence on the part of defendants, in not having the cellar fenced, and that a reasonably safe fence would have prevented the accident. They assessed the damages which plaintiff was entitled to recover at $2,500. It appeared that defendants' building, in common with most of the other buildings in the town of Windsor, was destroyed in the fire of the 17th October, 1897. The accident to plaintiff occurred 38 days later, and arose from plaintiff's horse becoming unmanageable, in consequence of taking fright at a passing train, and jumping into the cellar, taking with it plaintiff, who had been standing on the sidewalk holding it:—Held, that the question of negligence was for the jury and that their finding should not be set aside, even although the Court disapproved of it as being extreme under the circumstances. Held, that the obligation of the owner of property, adjoining a highway, upon which there is a dangerous excavation, to fence it for the protection of foot passengers, applies equally to all persons lawfully using the highway. Held, Graham, E. J., dissenting, that the point that the proximate cause of the accident was the noise of the locomotive frightening plaintiff's horse, was not open to defendants, that point having been abandoned at the trial, and the defence rested wholly upon the ground that defendants were not bound to fence except for the protection of foot passengers. Held, that the damages allowed by the jury were not excessive under the circumstances. *Davis* v. *Commercial Bank of Windsor*, 32 N.S.R. 366.

III. Carriage of Goods.

—**Railway—Pullman car—Arts. 1814, 1815, C.C.**]—A sleeping car company is not liable as an inn-keeper, nor as a common carrier, for the loss of baggage belonging to a passenger. In order to subject the company to liability, a specific act of negligence must be proved. *Smith* v. *Pullman's Palace Car Co.*, 5 Rev. de Jur. 423.

IV. Common Fault.

—**Volunteer—Common fault—Division of damages.**]—P. was proprietor of certain lumber mills and a bridge leading to them across the River Batiscan. The bridge being threatened with destruction by the spring floods, the mill-foreman called for volunteers to attempt to save it by undertaking manifestly dangerous work in loading one of the piers with stone. While the work was in progress the bridge was carried away by the force of the waters and one of the volunteers was drowned. In an action by the widow for damages.—Held, that the maxim, *volenti non fit injuria*, did not apply, as the case was one in which both the mill-owner and deceased were to blame, and that, being a case of common fault, the damages should be divided according to the jurisprudence of the Province of Quebec. *Price* v. *Roy*, 29 S.C.R. 494, reversing in part 8 Que. Q.B. 170.

V. Contributory Negligence.

—**Findings of jury—New trial—Evidence.**]—On the trial of an action against a Street Railway Company for damages in consequence of injuries received through the negligence of the company's servants, the jury answered four questions in a way that would justify a verdict for the plaintiff. To the fifth question, "could Rowan by the exercise of reasonable care and diligence have avoided the accident?" the answer was, "we believe that it could have been possible."—Held, that this answer did not amount to a finding of negligence on the part of the plaintiff as a proximate cause of the accident which would disentitle him to a verdict.—Held, further, that as the other findings established negligence in the defendant which caused the accident, which amounted to a denial of contributory negligence; as there was no evidence of negligence on plaintiff's part in the record; and as the Court had before it all the materials for finally determining the question in dispute, a new trial was not necessary. *Rowan* v. *Toronto Railway Co.*, 29 S.C.R. 717.

—**Highway—Want of repair—Negligence of driver.**]—See Municipal Corporations, XI.

VI. Crown Officers.

—**Laches of Crown officials—Province of Quebec.**]—The rule of law that the Crown is not liable for the laches or negligence of its officers obtains in the Province of Quebec except where altered by statute. *Black* v. *The Queen*, 29 S.C.R 693.

And see Crown, IV.

VII. Damage by Animals.

—**Responsibility—Art. 1055 C.C.**]—The owner of an animal who has hired or lent it to

another person, and who was not guilty of any imprudence in doing so, is not responsible for the damage caused by it, the responsibility in such case, if any, devolving upon the person who is using the animal. *Béliveau* v. *Martineau*, Mont. L.R., 2 Q.B. 133, followed. *Trottier* v. *Bélec*, 15 Que. S.C. 284, affirmed by Court of Queen's Bench, Jan. 1899.

—Responsibility—Fault—Art. 1055 C.C.]—The responsibility of the owner of an animal for damage caused by it is not absolute, but may be rebutted by proof of absence of fault, negligence or imprudence on his part. Therefore a stableman, attending a mare which was not vicious, but merely skittish, of which fact the plaintiff when he undertook his duties as stableman, was well aware, is not entitled to recover for damages caused by a kick,—he being obliged to bear the risks necessarily attached to his occupation, where such risks do not result from any fault of the employer. *Noel* v. *Duchesneau*, 15 Que. S.C. 352.

—Suffering dog to go at large—Sheep killing—Evidence—Case for Trial Judge—Damages.]—In an action brought by plaintiff against defendant to recover the value of a number of sheep, which were alleged to have been killed and injured by defendant's dog, the evidence shewed that, after a number of sheep had been killed, a watch was kept, when defendant's dog and another, owned by C., were found attacking a sheep, defendant's dog, having hold of the sheep at the time. Also that the two dogs had been heard by defendant barking in the vicinity on several occasions, but were supposed to be chasing rabbits, and that, after defendant's dog was sent away, no more sheep were destroyed. Per Meagher, J., (Townshend J., concurring):—Held, that there was evidence to support a finding that it was defendant's dog which did the killing. Also, that the case was one that was particularly for the trial Judge, and that his conclusion should not be interfered with except upon clear grounds. Also, that the trial Judge was justified in holding defendant liable for the value of the sheep which his dog was found killing, and for one-half of the remaining damage. Per Graham, E.J., (Henry, J., concurring); Held, that the trial Judge was not justified in drawing the inference he did, as to the sheep killed previously to the date when the two dogs were found uniting in the attack. *Williams* v. *Woodworth*, 32 N.S.R. 271.

VIII. 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. *Citizens' Light and Power Co.* v. *Lepitre*, 29 S.C.R. 1.

—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 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 was also 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, that in the absence of evidence of circumstances leading to a different conclusion, the act of placing the caps where they were found could fairly be attributed to the workmen, who alone were shewn 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. in exploding the cap as he did 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*, 29 S.C.R. 188.

IX. Injury to Adjoining Proprietor.

—Setting out fire—Damages.]—The defendants, having used fire to burn a ring or guard around some of the hay stacks on their farm, took measures to, as they thought, effectually put it out before leaving it; but high winds having prevailed during the next two days some smouldering embers were blown into flame and spread to the plaintiff's property, causing damage to him. The Trial Judge found as a fact that the defendants had not been guilty of negligence, having used every reasonable precaution to extinguish the fire, and having had reason to believe that it was completely extinguished: Held, that the defendants' use of fire under the circumstances was a customary one for purposes of agriculture in Manitoba, and was even justified by the Fires Prevention Act, R.S.M. c. 60; and that, as they had not been guilty of negligence, they were not

liable to the plaintiff for the damages claimed: *Owens* v. *Burgess*, 11 Man. R. 75, and *Buchanan* v. *Young*, 23 U.C.C.P. 101, followed. *Chaz* v. *Les Cisterciens Reformés*, 12 Man. R. 330.

X. Injury to Workman.

—Responsibility—Master and servant—Personal injuries—Insufficiency of tackle.]—Where an accident results from the insufficiency of tackle—as in this case, in which the chock holding the hawser used in towing gave way, and the plaintiff, a workman, was struck by the hawser—the employer is responsible. *Abbott* v. *Anderson*, 15 Que. S.C. 281.

XI. Joint Tort-feasors.

—Master of barge—Discharging cargo—Accident—Action against owner and consignee—Settlement with consignee.]—The master of a barge, injured while discharging cargo, brought an action against the owner and the consignee, the latter being primarily responsible. Pending the action he settled with the consignee, giving him an absolute release for a small sum compared with the damages claimed:—Held, that if he had any cause of action against the owner, which was doubtful, the release of the consignee released the owner also. *Cadieux* v. *Laplante*, 14 Que. S.C. 446.

And see Action.

XII. Master and Servant.

—Breach of statutory duty—Fellow-servant—Excessive damages—New trial.]—Where a statutory direction imposed upon an employer has not been observed, it is no defence that its non-observance is due to the negligence of a fellow-servant of the person injured. The widow and child of a person killed in consequence of the defendants' negligence may, when letters of administration to his estate have not been issued, bring an action under R.S.O. c. 166, without waiting six months. The Court, thinking that the damages awarded by the jury in an action for causing death were excessive, ordered that there should be a new trial, unless the plaintiffs accepted a reduced amount. *Curran* v. *Grand Trunk Ry. Co.*, 25 Ont. App. 407.

—Master and servant—Hiring of servant by third party—Control over service.]

See Master and Servant, II.

XIII. Municipal Corporations.

—Fire department—Negligence—Damages.]—Though municipal corporations are not bound by law to establish and manage a fire department, yet if they do so they are liable for injuries caused by the negligence of the servants employed by them therein while in the performance of their duties. *Seymour* v. *Township of Maidstone*, 24 Ont. App. 370, distinguished. *Hesketh* v. *City of Toronto*, 25 Ont. App. 449.

—Highway—Want of repair—Negligence of driver.]—A highway, in an old and thickly-settled district, over which there is much traffic, is out of repair within the meaning of the statute when a large stump is allowed to stand in the highway just at the edge of the travelled way. *Semble*, where horses are running away without any fault of the driver, and while he is still endeavouring to recover control of them and he sustains injury owing to such a defect in the highway, he is entitled to damages. The contributory negligence of the driver of the vehicle in such a case is not an answer to an action for injuries sustained by an occupant thereof, who has in good faith entrusted himself to the driver's care. *Foley* v. *Township of East Flamborough*, 26 Ont. App. 43, reversing 29 Ont. R. 139.

—Master and servant—Negligence—Independent contractor.]—The relationship of master and servant does not exist between a municipal corporation and a teamster hired by them by the hour to remove street sweepings with a horse and cart owned by him, the only control exercised over him being the designation of the places from which and to which the sweepings are to be taken, and the municipal corporation are not liable for an accident caused by his negligence while taking a load to the designated place. *Saunders* v. *City of Toronto*, 26 Ont. App. 265, reversing 29 Ont. R. 273 and C.A.Dig. (1898), 272.

—Removal of snow from streets—Slope from centre to sidewalk—Accident—Responsibility.]—The plaintiff, a woman aged seventy-nine years, while passing unassisted along a narrow street at night during a spring thaw, fell on a crossing which sloped from the centre of the street towards the sidewalk, and fractured her thigh:—Held, that the City of Montreal is not obliged to remove the snow from narrow streets, such removal being practically impossible, and the occurrence of slopes from the centre of the street to the sidewalks being a necessary consequence of the non-removal of the snow and of climatic conditions, the city was not responsible for the accident. *Bonin* v. *City of Montreal*, 15 Que. S.C. 492.

—Highway—Liability for non-repair—Ice and snow on sidewalk.]—The plaintiff's claim was for damages for an injury sustained by falling upon an icy slope which had formed on a sidewalk in the City of Winnipeg adjacent to a public well supplied with a pump which was daily used by a large number of people. The well was one of about sixty provided by the corporation and maintained at its expense, and a number of men were employed by the corporation whose duty was to visit the wells from time to time during the winter and remove or reduce the mounds of ice on the sidewalks and around the pumps caused by the freezing of the water that dripped from them or was spilled from pails while being carried away. One of these employees was on the spot on the very day of the accident and

did not consider it necessary to do anything for the purpose of making the place more safe for foot passengers, and other employees of the city whose duty it was to report unsafe conditions had passed the place on the same day and made no report upon it. The Trial Judge found on the evidence that the ice mounds and slope on the sidewalk had been caused, not from the water that dripped from the pump or was spilled in filling pails there, but by the spilling of water from the pails while being carried along the sidewalk or in the filling of other vessels and so were the result of negligence on the part of other persons and not of any faulty construction of the pump or its approaches; and that the place where the accident happened was not shewn to have been at the time more unsafe than many other spots on the sidewalks are frequently rendered by local conditions when freezing and thawing follow each other at short intervals:—Held, that the mere allowance of the formation and continuance of obstructions or dangerous spots in the highways due to accumulations of snow or ice may amount to non-repair for which the corporation would be liable, but in every such case the question to be determined is whether, taking all the circumstances into consideration, it is reasonable to hold that the municipality should have removed the danger. *City of Kingston* v. *Drennan*, 27 S.C.R. 46, followed. That in the present case it would not be reasonable to hold the defendants liable, as there were so many such wells in the city usually placed at street crossings and in constant use; and to keep the sidewalks near them completely free from ice or roughened by chopping or sprinkling some substance upon them would have been well nigh impossible. *Taylor* v. *City of Winnipeg*, 12 Man. R. 479.

XIV. Proof of Negligence.

—Hire of tug—Conditions—Repairs—Presumption of fault.]—The company chartered the tug "Beaver" from K., by written contract dated at Quebec, 22nd May, 1895, by which it was agreed that K. should charter 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 one month, the rate to be forty dollars per day. K. to furnish tug, crew, provisions, oil, etc., and everything necessary except coal and pilots above Montreal. The tug to leave next morning's tide, and 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 the 8th July, 1895, when, while still in their possession, the pilot took her, in the day time, into waters at the foot of the Cornwall Rapids, in the River St. Lawrence, where she struck against some submerged hard substance and sank. 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 admitted the rent due and tendered that portion of the claim into Court. The Superior Court rendered judgment for the amount of 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 the Queen's Bench increased the verdict to the full sum claimed, $4,909.90, by adding the amount of the surveyor's 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 day time, into waters where she struck was *prima 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 she was controlled and used by them. Held, further, that the proper estimate of the damages under the circumstances, was the cost of the repairs, which should be assumed to be the measure of 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. *Collins Bay Rafting and Forwarding Co.* v. *Kaine*, 29 S.C.R. 247.

—Municipal corporation—Statutory officer.]—In an action against a municipal corporation for damages in consequence of a carriage having been upset by running against a pile of sand left on the highway, one of the occupants having been thrown out and seriously injured, there was no direct evidence as to how the obstruction came to be placed on the highway, but it appeared that statute labour has been performed at the place of the accident immediately before under the direction of the pathmaster, an officer appointed by the corporation under statutory authority. The evidence indicated that the sand was left on the road by a labourer working under directions from the pathmaster or by a

ratepayer engaged in the performance of statute labour.—Held, that the action must fail for want of evidence that the injury was caused by some person for whose acts the municipal corporation was responsible. *McGregor* v. *Township of Harwich*, 29 S.C.R. 443.

—Matters of fact—Finding of jury.]—W. was working on a vessel in port when a boom had to be taken out of the crutch in which it rested, and he pointed out to the master that this could not be done until the rigging supporting it, which had been removed, was replaced, which the master undertook to do. When the boom was taken out it fell on the deck and W. was injured. In an action against the owners for damages, the jury found that the fall of the boom was owing to the said rigging not being secured, but that this was not occasioned by the negligence of the owners or their servants.—Held, that the first part of the finding did not necessarily mean that the rigging had never been secured, or that if secured originally it had become insecure by negligence of defendants, and the jury having negatived negligence, their finding should not be ignored. *Williams* v. *Bartling*, 29 S.C.R. 548, affirming 30 N.S.R. 548.

—Injury by frightened horse—Fortuitous event—Responsibility.]—If a horse, frightened by an unexpected occurrence such as the fall of a plank from the upper part of a house in course of repair, causes damage, the owner will not be responsible if he proves that the horse is of a gentle and quiet character and that he handled him under the circumstances with the usual precautions. It is necessary to prove fault on the owner's part before he can be made responsible for the damages so caused. *City of Quebec* v. *Picard*, 14 Que. S.C. 94.

— Accident — Damages — Responsibility — Presumptions.]—The plaintiff was hired by the defendants to discharge a coal laden steamer; while engaged in the hold of the steamer a large piece of coal fell off the tub which was being hoisted, and striking him on the back inflicted on him a severe injury. The plaintiff, according to the evidence, was free from fault:—Held, that this being so, there arises a strong presumption that plaintiff has a recourse against the defendants. The *onus* of proving *cas fortuit* or *force majeure* to dispel this presumption is on the defendants. If the defendants fail in adducing this evidence, it is not necessary for the plaintiff to prove to what special act of negligence, error or inattention on the part of the defendants, the accident was due. He must be awarded damages even without being able to do so. *Joint* v. *Webster*, 15 Que. S.C. 220.

—Railway Co.—Emission of sparks from engine—Neglect of road bed—Findings of jury—Concurrent holdings of Courts below.]

See APPEAL, IV.

XV. PROXIMATE COURSE.

—Trespasser — Dangerous way—Warning — Imprudence.]—A cow-boy aboard a ship on the eve of departure from the port of Montreal, was injured by the falling of a derrick then in use which had been insecurely fastened. He was not at the time engaged in the performance of any duty and although he had been warned to "stand from under" he had not moved away from the dangerous position he was occupying: Held, that the boy's imprudence was not merely contributory negligence but constituted the principal and immediate cause of the accident and that, under the circumstances, neither the master nor the owners of the ship could be held responsible for damages on account of the injuries he received. *Roberts* v. *Hawkins*, 29 S.C.R. 218.

—Dangerous machinery—Statutory duty—Cause of accident.]—K., a workman in a cotton mill, was killed by being caught in a revolving shaft and dashed against a beam. No one saw the accident, and it could not be ascertained how it occurred. In an action by his widow and infant children against the company the negligence charged was want of a fence or guard around the machinery (which caused the death of K.) contrary to the provisions of the Workmen's Compensation Act:—Held, that whether the omission of such statutable duty could or could not form the basis of an action at common law, the plaintiffs could not recover in the absence of evidence that the negligence charged was the cause of the accident. *Canadian Coloured Cotton Mills Co.* v. *Kervin*, 29 S.C.R. 478, reversing 25 Ont. App. 36.

—Municipal corporation—Obligation to maintain roads in good order—Responsibility for accident—Imprudence of person injured.]—The fact that a municipal corporation has, for many years, left a public road in a defective condition, owing to the projection of a rock thereon, thus forcing vehicles to make a turn which otherwise would be unnecessary, constitutes negligence.—But where the proximate or determining cause of the accident is not the negligence of the defendant, but the gross imprudence and want of ordinary care of the plaintiff, his claim for damages will not be maintained. *Davignon* v. *Corporation of Stanbridge Station*, 14 Que. S.C. 116.

—Accident—Contributory negligence—Liability.]—To establish the liability for damages resulting from an accident, it must be ascertained to whose negligence the accident was primarily due. If the defendant alone was in fault, he is liable for the whole of the damages; if both parties have been negligent, they must be apportioned, and if all the blame lies on the party injured he cannot recover.—In this case the plaintiff, a workman, did not use the tools placed at his disposal; in moving logs he used a small pick instead of a lever, the former not being the proper implement for such work, and he

was the more to blame as his attention had been specially drawn to this imprudence before. His negligence was the proximate cause of the accident, and he could not recover damages from his employer. *Fortier* v. *Lauzier*, 14 Que. S.C. 359.

—Responsibility—Carelessness of employee.]—The plaintiff's daughter, while printing envelopes on a Gordon press, dropped some of the envelopes, and while stooping to pick them up her sleeve was caught in the cog-wheels and her arm was injured. The factory inspector had never directed the cog-wheels to be covered, and in practice the wheels of these presses are never covered, and no like accident was known to have occurred before:—Held, that the employer could not be held responsible, the accident being the result of the employee's carelessness. *Hunt* v. *Wilson*, 15 Que. S.C. 355.

XVI. Railways and Tramways.

—Running of trains—Approaching crossing—Warning—Shunting.]—S. 256 of the Railway Act, 1888, providing that "the bell with which the engine is furnished shall be rung, or the whistle sounded, at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway" applies to shunting and other temporary movements in connection with the running of trains as well as to the general traffic. *Canada Atlantic Ry. Co.* v. *Henderson*, 29 S.C.R. 632, affirming 26 Ont. App. 437.

—Street railways—Collision—Contributory negligence.]—Where the evidence of negligence and of contributory negligence are so interwoven that contributory negligence is brought out and established on the evidence of the plaintiff's witnesses, if there is no conflict on the facts in proof, the Judge may withdraw the question from the jury and direct a non-suit. *Wakelin* v. *London and South-Western Ry. Co.*, 12 App. Cas. at p. 52, referred to. In an action against a street railway company for negligence, it appeared that an electric car of the defendants was being run at a very rapid speed and that the gong was not sounded as the car approached a certain street, at the junction of which the plaintiff, who was driving a horse along the same street and in the same direction in which the car was going, turned in front of the car to cross the rails, when a wheel of his vehicle was struck by the car, and he was injured. It also appeared by the evidence of his own witnesses that he did not, before turning, look or listen to ascertain the position of the car, although he knew it was coming:—Held, that this was negligence on his part, and was the proximate cause of the disaster, for the defendants could not, by the exercise of reasonable or any degree of diligence or care, after this negligence of the plaintiff, have avoided the misfortune. *Danger* v. *London Street Ry. Co.*, 30 Ont. R. 493.

—Rails on public street—Accident from—Responsibility.]

See Municipal Corporations, XI.

—Railways — Connecting lines — Negligence—Passenger—Cattle drover—Free pass.]

See Railways and Railway Companies, III.

—Injury to employee on railway—Fellow-servant.]

See Railways and Railway Companies, VI.

—Flooding of adjoining land caused by embankment—Damages.]

See Railways and Railway Companies, IV.

—Electric tram company—Negligence of motorman—Undue speed.]

See Street Railways.

XVII. Telegraph Company.

— Transmission of messages—Proper care—Printed conditions—Agency—Limited liability.]—A telegraph company, having received payment for a message at the established rate, is bound to transmit the same carefully and correctly, and where instead of the word "one" the word "ten" was sent there is a presumption of negligence against the company. Where a message was verbally communicated to the operator who accepted it in that shape and writes it out on the customary blank form placing the name of the sender at the end, the latter is not bounded by the conditions printed at the head of the blank form which were not shewn to him, nor his attention drawn to them, he being unable to read or write. The operator is not the agent of the sender. *Quære*, can a telegraph company stipulate for immunity from the consequences of negligence on the part of its employees, or limit its liability? See *Great North Western Telegraph Co. v. Lawrance*, 1 Que. Q.B. 1: Are telegraph companies common carriers? *Bérubé* v. *Great North Western Telegraph Co.*, 14 Que. S.C. 178.

XVIII. Warehousemen.

— Responsibility— Damages.]—In an action against the owners of a grain elevator to recover damages for alleged negligence in the care of grain, one of the grounds of negligence found by the jury was that the grain had been taken into the elevator from the vessel while rain was falling and that the vessel's hatches had not been protected.—Held, that the responsibility of the defendants did not commence till the grain was delivered to them; that therefore there was no duty cast upon them to protect the grain

during the process of unloading; and a general assessment of damages having been made upon this and other grounds of negligence, a new trial was ordered. *Dunn* v. *Prescott Elevator Co.*, 26 Ont. App. 389.

See CROWN.
" DAMAGES.
" MASTER AND SERVANT.
" MUNICIPAL CORPORATIONS.
" RAILWAYS AND RAILWAY COMPANIES.

— Newspaper comment on pending trial — Contempt of Court.]

See CONTEMPT OF COURT.

NEW TRIAL.

See PRACTICE AND PROCEDURE, XLI.

NOTARY PUBLIC.

—Action against — Notice — Prescription — Art. 22 C.C.P. (old text) — Arts. 2598, 3607 R.S.Q.]—

See ACTION, XVIII.
" LIMITATION OF ACTIONS, VI.

NOTICE.

—Fire insurance—Condition in policy—Notice of subsequent insurance — Inability of assured to give notice.]—See INSURANCE, II.

—Confession of judgment — Inscription — Notice to defendant—Art. 934 C.C.P.]

See JUDGMENT, IV.

NOVATION.

—Insurance—Benefit society—Novation.]

See BENEFIT SOCIETY.

—Principal and surety—Mortgage—Variation of contract—Novation.]

See PRINCIPAL AND SURETY, II.

OATH.

—Experts—Official certificate of being sworn—Signature.]

See PRACTICE AND PROCEDURE, XXXVII.

OBLIGATION.

—Transfer—Acceptance of signification by debtor —Action by transferee—Power of attorney.]

See DEBTOR AND CREDITOR, III.

OPPOSITION.

—Distraction of costs—Execution in attorney's name—Opposition to seizure—Plaintiff's right to contest.]—See COSTS, IV.

—Judgment of distribution—Opposition afin de conserver—Permission to file after expiry of delay—Costs of new judgment.]

See COSTS, VII.

—Execution—Domicile of defendant—Art. 555 C.C.P. (old text).]—See EXECUTIONS, I.

— Execution—Seizure—Procès-verbal—Art. 630 C.C.P.—Second seizure—Art. 623 C.C.P.]

See EXECUTIONS, IV.

—Opposition to judgment—Delays—Dismissal—Right to requête civile after.]

See JUDGMENT, XV.

—Dismissal—Absence of opposant—Recourse—Requête civile.]

See PRACTICE AND PROCEDURE, XLIII.

—Motion to examine opposant—Delay—Art. 651 C.C.P.]

See PRACTICE AND PROCEDURE, XVIII.

—Péremption—Motion—Want of appearance—Art. 161 C.C.P.]

See PRACTICE AND PROCEDURE, XLVI.
" PRACTICE AND PROCEDURE, LIII.

ORDER.

See PRACTICE AND PROCEDURE, XLIV.

ORDER IN COUNCIL.

—B.C. Mineral Act, 1896, ss. 24, 28, 53 and 161—Assessment work—Power of Lieutenant-Governor in Council to extend time for.

See MINES AND MINERALS, III.

OUVRIER.

—Dangerous employment—Liability of master.]

See MASTER AND SERVANT, IV (*a*).

PARENT AND CHILD.

—Specific performance—Agreement to compensate—Improvements.]—*Smith* v. *Smith*, 26 Ont. App. 397, affirming 29 Ont. R. 309 and C.A. Dig. (1898) 324.

—**Support — Transfer of right — Written agreement — Oral Variations.**] — At common law there is no legal obligation on the part of a parent to maintain his children: the duty is only a moral one. A father, after the death of his wife, agreed in writing with her mother that she should, at her sole expense, have the custody, maintenance and education of his children in consideration of his renouncing his rights thereto and of other considerations:—Held, that he could transfer his rights as a parent and, in the absence of fraud, evidence of an oral promise by him before the execution of the agreement that he would pay for the maintenance of the children was inadmissible. *Wright* v. *McCabe*, 30 Ont. R. 390.

—**Tutelle—Right of mother—Decision of prothonotary—Review—Art. 263 C.C.**]—The right of the mother to guardianship (*tutelle*) of her children is not absolute; she may be deprived of it for cause.—Before the prothonotary, if the relatives wish to shew the reasons and grounds for their opposition to the nomination of the mother, he should take and put in writing their assertions and declarations and afterwards decide on appreciation of the whole. If he refuses to hear all and gives judgment, even in favour of the mother, there may be a petition in review by virtue of Art. 263 C.C. *Noël* v. *Chevrefils*, 15 Que. S.C. 530.

—**Right to custody of child—Habeas corpus.**]—The parents of an infant who is under the age at which it may elect as to its custody, may be deprived of that custody if the Court is satisfied that such a course is necessary for the child's welfare. Where an infant has attained the age of election, the Court ought to separately examine the infant, and adopt its wishes on the subject. *The Queen* v. *Redner*, 6 B.C.R. 73.

—**Female infant under sixteen—Right of adoptive father to custody of, as against stranger—Costs.**]—In habeas corpus proceedings to recover possession of a female child, stated to have been adopted and brought up by the applicant and to have been taken away from him against his will by a Refuge Home:—Per Drake, J.: A person who has adopted and brought up a child obtains thereby no legal right to its custody. The child being a female under sixteen, the age of consent or election as to custody, her choice should not be considered, but her welfare and well-being only, and that same were, on the facts, furthered by continuing the custody of the Refuge Home. If the child had been over the age of consent, the Court would have no right to determine who should have the custody or control of her, but only to set her at liberty if detained in unlawful custody against her will. The Court has power under Supreme Court Act, s. 10, and Rule B.C. 751, to award costs upon a rule *nisi* for habeas corpus. Upon appeal to the Full Court, per Walkem and Irving, JJ., dismissing the appeal, adoption is not recognized by the law of England, and a foster-parent has no more legal right to the custody of the child of their adoption than a stranger. *Re Quai Shing*, 6 B.C.R. 86.

—**Insurable interest of mother in life of child.**]
See INSURANCE, III.

PARLIAMENTARY ELECTIONS.

—**Filing of petition—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. *Nicolet Election Case*, 29 S.C.R. 178.

—**Refusing to give new ballot—Breach of duty—Damages.**]—The word "conveniently" in s. 109 of R.S.O. c. 9, the Ontario Election Act, means "conveniently for the voter and for his wish, purpose and intention in voting." The plaintiff, an elector, in marking his ballot at an election of a member to serve in the Legislative Assembly of Ontario inadvertently marked it for the candidate against whom he intended to vote. He immediately and before he had left the apartment at the polling place set apart for marking ballots informed the defendant, the deputy returning officer, of his mistake, and asked for another ballot paper. The defendant said he must first see the marked ballot paper, which the plaintiff refused to allow, but, on the scrutineer for his party recommending him to do so, he handed it to the defendant, without creasing or folding it that it might be placed in the ballot box, in such a way that those present could not see how it was marked. The defendant looked at it, and then either shewed or placed it so that it could be and was seen by nearly all present, and contending that it was not a spoiled ballot, contrary to the plaintiff's protest, placed it in the ballot box, and it was counted for the person against whom the plaintiff intended to vote:—Held, that the defendant by his acts in disclosing how the plaintiff marked his ballot paper, in not cancelling it, and in refusing to give the plaintiff another ballot paper on his demanding one, and by his action compelling him to vote for the candidate whom he wished to oppose, was thereby guilty of breaches of duty which entitled the plaintiff to judgment in his favour for the penalties under the statute. *Hastings* v. *Summerfeldt*, 30 Ont. R. 577.

—**Quebec Election Act—Prescription—Proclamation of candidate elected.**]—The "proclamation" of the candidate elected, referred to in s. 321 of the Quebec Election Act, 59 V., c. 9, is that provided for in s. 196 of the said Act, viz.: that made by the returning officer after the summing up of the votes, unless there be a re-count made by a Judge, in which case, as provided by s. 209 of said

Act, the returning officer, after receiving the Judge's certificate as to the result, proclaims elected the candidate having the highest number of votes. *Pouliot* v. *Dozois*, 14 Que. S.C. 250.

—Election petition—Practice—Case stated—R.S.B.C. c. 67, s. 231.]—Where the case raised by an election petition embraces several distinct grounds of complaint, the Court has power to state only one part of the case. *Jardine* v. *Bullen*, *Esquimalt Election Case*, 6 B.C.R. 220.

—Election petition—Service by deputy sheriff—Disabilities.]

See PRACTICE AND PROCEDURE, LIII.

PARLIAMENTARY PRIVILEGE.

—Member of Parliament—Enforcing discovery—Privilege—Striking out defence.]

See PRACTICE AND PROCEDURE, XX.

PARTICULARS.

See PRACTICE AND PROCEDURE, XLV.

PARTIES.

I. ACTION ÈS QUALITÉ.

—Parties to action—Art. 81 C.C.P.]—A person cannot use the name of another in pleading except as allowed by Art. 81 C.C.P. Hence the attorney of a succession is not entitled to sue in his own name in his quality of attorney. *Lalonde* v. *Legault*, 15 Que. S.C. 297.

II. ADDING PARTIES.

—Action against executor for legacy—Person to whom legacy paid.]—A testator gave legacies to three grandchildren, to be paid at majority or marriage, and provides: "In case of the death of any one of my said grandchildren, the bequests . . . shall be divided among and go to the survivor or survivors of them, share and share alike." All three survived the testator, but two died before marriage or majority, and the executor paid all three legacies to the survivor. The plaintiff, the personal representative of the grandchild who was the second to die, brought this action against the executor to recover one-half of the legacy of the grandchild who died first. —Held, that, as a determination of the proper construction of the will was necessary to entitle the plaintiff to succeed, it was not an improper exercise of discretion to require the surviving grandchild, or his representative, to be added as a party, so as to prevent an adjudication being had as to his rights under the will, behind his back, and to have the question decided in one action. *Clifton* v. *Crawford*, 18 Ont. Pr. 316.

—Refusing plaintiff leave to add parties—Conspiracy.]—See PLEADING, I.

III. DEATH OF PARTIES.

—Saisie-arrêt after judgment—Deceased plaintiff—Motion for mani-levée—Intervention—Arts. 607, 677 C.C.P.]—If a *saisie-arrêt* after judgment is taken in the name of a deceased plaintiff, and defendant and the *tiers-saisi* demand by motion *mani-levée* of such seizure, the representatives of the deceased plaintiff will be ordered to intervene in the contestation of the *saisie-arrêt*. *Lindsay* v. *Palliser*, 2 Que. P.R. 206.

—Motion for peremption—Suggestion—Judgment—Art. 269 C.C.P.] — Judgment will not be given on a motion for *péremption d'instance*, taken *en délibéré* after filing of a suggestion of the plaintiff's death, until the parties in interest have taken up the *instance* or been brought into the cause. *Macadam* v. *Thompson*, 2 Que. P.R. 216.

And see ACTION, XXV.

IV. JOINDER.

—Action by company—Bondholders and shareholders—Issues.]—In an action by a company on a contract in which some of the bondholders and shareholders were joined as co-plaintiffs, the company raising questions affecting them individually.—Held, that the action in Court should be confined to the issues between the company and the defendants. *Great North West Central Railway Co.* v. *Charlebois* [1899], A.C. 114.

—Ejectment—Sub-tenants.]—In an action by a landlord for possession of the premises, it is not necessary to make sub-tenants in actual possession parties defendant, and a judgment for possession may be given against the tenant under which the sub-tenants must go out. *Synod of Toronto* v. *Fisken*, 29 Ont. R. 738.

—Claimants to same mining ground.]—All claimants under the Mineral Act to any part of the ground covered by the mineral claim of a plaintiff may be made defendants to an action by him to enforce an adverse claim by him against any one of such claimants. *Dunlop* v. *Haney*, 6 B.C.R. 170.

V. NECESSARY PARTIES.

—Patent of invention—Action for royalties—Transfer of patent.]—In an action for royalties on a patented article the defendant cannot have transfers and his own deed of acquisition of the patent declared null if the parties to the transfers are not in the cause. *Dayon* v. *Canadian Fire Extinguishing Co.*, 14 Que. S.C. 367.

—Legacy—Action against executor.]—A legatee under a will cannot maintain an action against the executor for payment of his legacy

without bringing into the cause the heirs and other legatees of the deceased. *Stewart* v. *Stewart*, 2 Que. P.R. 121.

—Qui tam action — Copyright — Penalties — Amendment — Practice.]—In an action for penalties under the Copyright Act the Crown must be joined as a plaintiff, otherwise the action will be dismissed on exception to the form. An amendment adding the Crown as co-plaintiff will be allowed if the conclusions justify it. *Tremblay* v. *Quebec Printing Co.* 2 Que. P.R. 200.

VI. Parties Generally.

—Distraction of costs—Execution in attorney's name—Opposition to seizure.]—When an attorney who has obtained distraction of costs issues execution in his own name against the defendant the plaintiff to the action cannot contest defendant's opposition to the seizure to which he was not a party. *Cadieux* v. *Coursol*, 14 Que. S.C. 436.

VII. Proper Parties.

— Wife "marchande publique" — Right of husband to plead.]—The husband when made a party to a suit to authorize his wife, may defend the action against the latter by a plea to the merits and there is no necessity for him to adopt any proceeding to have himself declared a party in the cause for that purpose. *Shorey* v. *Radford*, 5 Rev. de Jur. 42.

VIII. Third Party Procedure.

—Conversion of goods—Relief over—Ont. Con. Rule 209.]—In an action for the conversion of goods, the defendant may bring in the person who sold him the goods as a third party, the words "any other relief over" in Rule 209 being wide enough to include a claim made by the defendant against his vendor. *Confederation Life Association* v. *Labatt*, 18 Ont. Pr. 238.

—Municipal assessment—Appeal from Council—Parties alleged to be improperly on roll—Mis en cause.]—If on an appeal to the Circuit Court from decisions of a municipal council retaining on the assessment roll the names of certain persons the appellant has not brought such persons into the cause, the Court should not strike them out of the roll without bringing them in to enable them to establish their rights, and therefore will before giving judgment, of its own motion, order them to be made parties to the cause.—The public notice that the secretary-treasurer of the municipality is obliged to issue on receipt of the writ is not sufficient to make those persons parties. *Rouleau* v. *Corporation of Ste. Anne de Pocatière*, 15 Que. S.C. 182.

—Third party — "Party affected by appeal."]
See Appeal, VII.

—Mis en cause—Fraudulent donation—Seizure against donor—Opposition—Contestation.]
See Donation.

PARTITION.

—Action for partition—Statute of Limitations — Recovery of land or rent.]
See Limitation of Actions, III.

PARTNERSHIP.

I. Actions by and against.

—Commercial partnership—Obligations — Solidarité.]—When the plaintiff does not allege either the insolvency or dissolution of a commercial partnership, his action against individual members cannot be maintained, but he must proceed against the firm with which he has contracted. All the members are jointly and severally (*solidairement*) bound for the obligations of the partnership, but the enforcement of any undertaking should be made against the partnership itself as long as it exists.—It is only after condemnation of the partnership that a creditor can, in virtue of the judgment condemning them jointly and severally, proceed against the individual members to compel them to satisfy such judgment and carry out the undertakings of the partnership. *Brasserie de Beauport* v. *Dinan*, 14 Que. S.C. 284.

—Compensation—Firm of attorneys—Payment to a member.]—A person who is sued for a debt due by him to a firm of attorneys cannot set off against the claim of the firm the amount of a promissory note given by him to a member of the firm, for which he took his personal receipt, particularly where it is proved that the note was given for a purpose not connected with the firm's business. *Taylor* v. *Lilley*, 15 Que. S.C. 457.

—Action against partnership—Separate defence—Exception to form.]—In an action against a partnership, one of the defendants may set forth, in a plea on the merits, that he is not a member of the defendant partnership, and that such allegation will not be rejected as being a matter of exception to the form. *Harvey* v. *Mowat*, 2 Que. P.R. 212.

II. Dissolution.

—Fraud and simulation—Deed of dissolution—Nullity.]—By a deed of dissolution of partnership, the partner who was to continue the business was rendered hopelessly insolvent, and the retiring partner (now claimant) was vested with the control of the business, and thereby enabled to pay off nearly all the debts of the old firm of which he was a member, and for which he was personally responsible, with the intent to pay himself later on, as

far as possible, out of the new credits which the partner continuing the business might afterwards obtain. The claimant waited until the debts for which he was personally liable had been paid off, and then drew large sums when he knew that the partner continuing the business was hopelessly insolvent:—Held, that even if the creditors of an insolvent at the time of passing such deed have all been paid, subsequent creditors, who have been intentionally defrauded by the deed, have a right to have it set aside as fraudulent and simulated. *Re Hughes*, 15 Que. S.C. 225.

III. Formation.

—**Dealing in lands—Statute of frauds.**]—A partnership may be formed by a parol agreement notwithstanding it is to deal in land, the Statute of Frauds not applying to such a case. *Archibald* v. *McNerhanie*, 29 S.C.R. 564, affirming 6 B.C.R. 260.

—**Participation in profits of business—Rent of immovable.**]—Participation in the profits of an enterprise or a business does not necessarily constitute a partnership (*société*). If the proprietor of an immovable on which an enterprise is carried on, stipulates for a proportion of the net profits as rent for his property, he is not, therefore, a partner in the business. *Reid* v. *McFarlane*, 2 Que. Q.B. 130, followed. *Denis* v. *Hudson Bay Co.*, 8 Que. Q.B. 236.

IV. Liability of Partners to Third Persons.

—**Partnership in mining venture—Equal participation in profit and liability to loss—Wages.**]—The defendants, R., a practical miner, and M., a medical practitioner, entered into an agreement in writing, with S., trustee for a Mining Company, to employ labour and to do certain work in connection with the development of a property owned by the company, in consideration of which, R. and M. were to be entitled to three-fourths of the ore mined, and a one-tenth interest in the property itself. R. acted as superintendent of the mine and made up the pay rolls and paid wages. The accounts as between R. and M., were made up on the basis of an equal right to profits, and an equal liability to loss:—Held, that R. and M. were partners, and that M. was jointly liable with R., to plaintiff who was employed by R. to do certain work in connection with the mine. *Hallett* v. *Robinson*, 31 N.S.R. 303.

—**Acceptance in firm name by one partner, for private debt, with consent of co-partner—Joint obligation—Discharge of surety.**]—The defendant, T. T., with the knowledge and consent of his partner, F. T., gave an acceptance in the firm name to retire a draft drawn for a debt that T. T. personally, owed the plaintiff firm. T. T., subsequently, gave a renewal, but, before it was accepted, the partnership between T. T. and F. T. was dissolved, though without plaintiff's knowledge:—Held, affirming the judgment in favour of plaintiffs, and dismissing defendant's appeal, that F. T., having authorized or consented to the use of the firm name on the original acceptance was bound thereby, that he was not entitled to be regarded as a surety, who could be discharged by the giving of an extension of time, and that the obligation being a joint one, and not a joint and several one, there could be no discharge except by satisfaction of the debt assumed, and not paid; Held, also, that a defence of discharge by extension of time, not shewing with whom the agreement for extension was made, was defectively pleaded. *Pitfield* v. *Trotter*, 32 N.S.R. 125.

V. Rights and Liabilities of Partners Beween Themselves.

—**Settled accounts—Release—Setting aside releases and opening accounts.**]—One of two members of a firm not possessing business capacity the other managed and controlled all the affairs, presenting at intervels to his partner statements of accounts which the latter signed on being assured of their correctness. In 1891 mutual releases of all claims and demands against each other, based upon statements so submitted by the active partner, were executed by each. In an action against the active partner to set aside these releases and open up the accounts:—Held, that all it was necessary to establish was, that in the accounts as settled there were such errors and mistakes as would inflict material injustice upon the plaintiff if the accounts should be held to be closed. *West* v. *Benjamin* 29 S.C.R. 282.

—**Contract—British Columbia Mineral Act.**]—Ss. 50 and 51 of the Mineral Act of 1896 (B.C.) which prohibit any person dealing in a mineral claim who does not hold a free miner's certificate, does not prevent a partner in a claim recovering his share of the proceeds of a sale thereof by his co-partner though he held no certificate when he brought his action, having allowed the one he had up to the time of sale to lapse. *Archibald* v. *McNerhanie*, 29 S.C.R. 564, affirming 6 B.C.R. 260.

—**Statute of frauds—Purchase of land for use of partnership — Parol agreement respecting.**]—Plaintiff alleged that defendant being his partner, bought land for the use of the partnership:—Held, on the evidence that there was not sufficient proof of such partnership to enable the Court to declare the defendant a trustee for the partnership. *Brown* v. *Grady*, 6 B.C.R. 190.

—**Servitudes—Art. 520 C.C.**]—A person who has built a house-wall on the line of division between him and his neighbour cannot oblige the latter to contribute immediately to the payment of that part (to a height of 10 feet) which serves as a fence-wall.—The right granted by Art. 520 C.C. to compel the

neighbour to contribute to the building of the fence-wall, does not apply where a person builds the wall of his house on the division line. The neighbour, in that case, is only obliged to pay half the value of the house-wall when he uses it under the ordinary rules relating to *mitoyenneté*. *Bernard* v. *Pauzé*, 14 Que. S.C. 140.

— Mitoyen wall — Encroachment — Footing course.]—Where the nature of the soil renders it necessary to do so, a person constructing a wall on the line of division between his land and that of his neighbour, is entitled to exceed the nine inches allowed by Art. 520 C.C., in order to place the footing courses under the surface in such a manner as to secure the stability of the wall. This, however, is subject to the right of the owner of the adjoining lot, if he desires to adopt a lower level to remove the footings extending beyond nine inches on his land, provided he adopts sufficient measures to protect the wall already built. *Rafter* v. *Burland*, 15 Que. S.C. 289.

PATENT OF INVENTION.

I. Infringement.

—Bad faith of infringer—Joint infringers—Damages.]—If a patent consists in a "combination," a person who, in bad faith, knowing it is an infringement to a patent, makes a part of such "combination," is liable in damages, and becomes joint infringer with the other for whom this work has been executed. *Larochelle* v. *Gauthier*, 14 Que. S.C. 87.

—Venue—Practice.]—In an action in British Columbia for damages for infringement of a patent, the writ need not be issued out of the Registry nearest the place of residence or business of the defendants, but s. 30 of the Patent Act is complied with if the venue is laid at the place of such Registry. In an action against a company for infringement of a patent the venue should be laid at the place of the Registry which is nearest the head office of the company. *Short* v. *Federation Co.*, 6 B.C.R. 385, 436.

—Interim injunction—Undertaking to keep account.]—Where the patent is a very recent one, the Court does not readily interfere by interim injunction when there is a serious question to be tried out as to the validity of the patent. The course of the Court is, under such circumstances, not to make an order for the injunction if the defendant undertakes to keep an account. [Townshend, J. (N.S.) in Chambers]. *Goodwin* v. *Fader*, 19 C.L.T. (Occ. N.) 364.

II. Pioneer Discovery.

—Evidence.]—Where one who says he is the inventor of anything has had an opportunity to hear of it from other sources, and especially where delay has occurred on his part in patenting his invention, his claim that he is a true inventor ought to be carefully weighed. *American Dunlop Tire Company* v. *Goold Bicycle Company*, 6 Can. Ex. C.R. 223.

III. Royalties.

—Royalty on patented articles sold by authority of justice—Procedure.]—A defendant, sued for royalties due by him, cannot have transfers and his own deed of acquisition of the patent declared null, where the parties to the transfers are not in the cause.—A person who is under an obligation to pay a royalty on all patented articles sold by him is liable for the royalty on such as may be sold while in his possession by authority of justice, at the instance of a creditor. *Doyon* v. *Canadian Fire Extinguishing Co.*, 14 Que. S.C. 367.

IV. Transfer of Patent.

—Assignment—Registration of transfer—R.S.C. c. 61, s. 26.]—Non-registration, in the Patent Office at Ottawa, of successive transfers of a patent, has not the effect of rendering the transfers null as between the parties thereto, the only effect of such want of registration being that the unregistered transfer or sales cannot be invoked against any subsequent transferee of the patent. *Doyon* v. *Canadian Fire Extinguishing Co.*, 14 Que. S.C. 367.

V. Validity.

—Pleading—Answer to plea attacking validity of patent.]—Where the plaintiff, in his action, does not attack the validity of letters patent of invention held by the defendant and referred to in the declaration, he is not entitled to attack the validity of such patent by his answer to defendant's plea. *American Stoker Co.* v. *General Engineering Co.*, 14 Que. S.C. 479.

PAYMENT.

—Benefit of universal legatee—Action for money paid—Transfer.]—See Action, XVII.

—Transmission of money by registered letter—Loss—Burden of loss—Negligence.]

See Debtor and Creditor, XI.

PELAGIC SEALING.

See Behring Sea Award Act, 1894.

PENALTY.

—Company — Duplicate list of shareholders—Penalty.]—See Company, VIII.

— Provincial elections — R.S.O. c. 9, s. 109 — Deputy-returning officer—Refusing new ballot paper.]—See Parliamentary Elections.

—Action for—Prohibition Plebiscite Act, 1898—Affidavit—R.S.Q. Arts. 5716, 5719.]

See STATUTE, I.
See ACTION, XIX.
" FINES AND PENALTIES.

PHARMACY ACT.

—Quebec Pharmacy Act — Art. 4035c R.S.Q.—Constitutionality—Conviction — Review on Certiorari.]

See PRACTICE AND PROCEDURE, XI.
" CONSTITUTIONAL LAW, IV (*b*).

PHYSICIAN.

—Surgical operations—Consent of person operated upon.]—A surgeon, who undertakes to perform a minor operation on a patient, is justified in performing a major operation, without the consent of the person operated upon, should such major operation be necessary to save the life of the patient. *Parnell* v. *Springle*, 5 Rev. de Jur. 74.

And see MEDICAL PRACTITIONER.

PLEADING.

I. AMENDMENT.
II. ANSWER TO PLEA.
III. COMPENSATION.
IV. COUNTERCLAIM.
V. DEMURRER.
VI. DENIAL OF SIGNATURE.
VII. FORM OF PLEA.
VIII. GENERAL DENIAL.
IX. INCONSISTENT PLEADINGS.
X. IRREGULARITY.
XI. NECESSARY AVERMENTS.
XII. REJECTION OF PLEA.
XIII. RÉPONSE EN DROIT.
XIV. SEPARATE DEFENCE.
XV. SPECIAL ENDORSEMENT.
XVI. STATEMENT OF CLAIM.
XVII. STATEMENT OF DEFENCE.
XVIII. SUFFICIENCY OF PLEADING.

I. AMENDMENT.

—Partnership — Conspiracy—Account—Parties.]—In an action for damages for a conspiracy in pursuance of which the defendants, as alleged, fraudulently withdrew moneys from the assets of a firm of which the plaintiff was a member:—Held, that refusing the plaintiff leave to amend by adding the assignee of the firm for the benefit of creditors as a party and by claiming an account of the moneys withdrawn by the defendants, was a proper exercise of discretion by the trial Judge which ought not to have been interfered with by the Divisional Court. *Smith* v. *Boyd*, 18 Ont. Pr. 296, reversing 18 Ont. Pr. 76.

—Declaration—Sale of goods—Evidence.]—An amendment of the declaration by alleging therein certain orders for goods which had been mentioned in a statement already of record, is admissible, the same being a mere amplification of the declaration.—A demand after *enquête* closed and final hearing, to amend a declaration based upon a contract in writing of a certain date, so as to make it agree with the facts proved, by substituting therefor a verbal contract of another date, ought not to be granted without allowing the other party to plead *de novo*, and must be refused if the evidence relied upon to make the change was inadmissible. *Marsh* v. *Leggat*, 8 Que. Q.B. 221, affirmed by Supreme Court, June 5th, 1899.

—Amendment of declaration—Service of—Art. 526 C.C.P.]—In a case where the law permits the declaration to be served separately from the writ, and it has been so served, and subsequently an amendment to the declaration is allowed, the declaration may, after amendment, by leave of the Judge, and upon such conditions as he may fix, be served *de novo*, and be dated on the day of making the amendment, without new service of the writ being necessary. *Hamilton* v. *Bovril Co.*, 15 Que. S.C. 62.

—Amendment of declaration—New cause of action—Declinatory exception.]—The plaintiff, suing as transferee of a claim, alleged a sale of goods at Montreal, by his transferor to the defendant. The latter, by declinatory exception, pleaded that no cause of action arose in Montreal. The evidence shewed that there had been no sale of goods at Montreal or elsewhere; that the claim which formed the basis of the action represented merely deductions allowed on return of empty bags to persons who had previously purchased goods through plaintiff's transferor while acting as defendant's agent at Montreal.—Held, that an amendment of the declaration to make the allegations accord with the proof could not be allowed, inasmuch as the amendment proposed to substitute an entirely distinct cause of action; and the allegation of a sale of goods at Montreal not being supported by the evidence, the declinatory exception was maintained. *Robinson* v. *McAllister*, 15 Que. S.C. 93.

—Art. 516 C.C.P.—Amendment of pleadings—Form of plea.]—When the plaintiff, by his answers, omitted through inadvertence to deny certain allegations of an affirmative nature contained in defendant's plea, he will be permitted, on motion, to amend his answer to plea, even after the argument of the case; and in such case, if defendant has

not been in any way prejudiced by the omission, plaintiff will be permitted to amend on the sole condition of bearing his own costs. *Kerr* v. *Sherbrooke Street Ry. Co.*, 15 Que. S.C. 362.

—Claim for rent—Error.]—A plaintiff will be allowed to amend his declaration so as to claim 26 months' rent instead of 23, when it appears that the extra three months' rent had not been demanded by an error caused by a transposition of figures. But he will not be allowed to claim, at all events on a motion to amend, a month's rent which became due since the institution of the action. *Desrosiers* v. *Tellier*, 2 Que. P.R. 88.

—Amending declaration—New pleading.]—If an amendment to the declaration is allowed after a plea is filed, the defendant in pleading anew may raise fresh grounds of defence to the whole action, and not merely to the amendment. *Lagueux* v. *Delisle*, 2 Que. P.R. 221.

—Declaration—Vacation—Arts. 513, 523, C.C.P.]—A plaintiff may amend his writ and declaration by adding to each the words, "Summary procedure," and such amendments will not be rejected on motion. This amendment may be made in vacation. *Smith* v. *Neven*, 2 Que. P.R. 236.

—Statement of claim—Capacity of parties plaintiff—Costs.]—The plaintiff, M., suing under the name of M. & Co., brought an action against the defendant for conversion of goods. At the time of the conversion complained of, M. was doing business with C. under the firm name of M. & C. After the conversion the partnership was dissolved, C. assigning to M. all the assets and property of the firm. No notice of assignment was given to defendant. At the trial, application was made for leave to amend, by setting out that plaintiff sued as successor to M. & C., but, subsequently, at the close of the trial, there was a motion, on notice given to the other side, for leave to withdraw the previous application, and for leave to amend by substituting M. & C., as plaintiffs, in place of M. & Co. The motion having been granted, and judgment given for the substituted plaintiffs, with costs, except of the motion for leave to substitute M. & C. for M. & Co.:—Held, allowing with costs defendant's appeal on the question of costs, that defendant was entitled to the costs of the withdrawn motion, and of the motion to amend, and also to the costs of the action and trial up to the time that the amendment was made. *McKay* v. *McDonald*, 31 N.S.R. 316.

II. Answer to Plea.

—Letters patent of invention—Answer to plea attacking validity of patent.]—Where the plaintiff, in his action, does not attack the validity of letters patent of invention held by the defendant and referred to in the declaration, he is not entitled to attack the validity of such patent by his answer to defendant's plea. *American Stoker Co.* v. *General Engineering Co.*, 14 Que. S.C. 479.

III. Compensation.

—Action by Crown—Petition of right.]—In an action by the Crown, the defendant cannot plead compensation, but must have recourse to a petition of right. *Coté* v. *Drummond County Ry. Co.*, 15 Que. S.C. 561.

IV. Counter-claim.

—Counter-claim for slander pleaded in action for goods sold—Costs.]—To an action for goods sold and delivered, defendant pleaded, among other things, a counter-claim, claiming damages for words spoken and published by the plaintiff of and concerning the defendant, viz., "I will have you put in Dorchester," meaning that defendant had been guilty of the commission of criminal offences, which would justify his imprisonment in the public penitentiary at that place:—Held, dismissing defendant's appeal with costs, that the counter-claim was properly struck out. Held, also, that the costs of the motion to strike out the counter-claim were in the discretion of the learned Judge who heard it, and he having exercised his discretion, by allowing the motion with costs, the Court would not interfere. *Lindsay* v. *Crowe*, 31 N.S.R. 406.

—Relief against co-defendant—Striking out—Costs—Pleading to counter-claim—Waiver.]

See Costs, V (*b*).

V. Demurrer.

—Acknowledgment of liability—Preuve avant faire droit.]—A municipal corporation brings an action against R. for the cost of two trading licenses specially alleging that he had acknowledged the liability and promised to pay the amount. Defendant demurs (*plaide en droit*) that the by-law is radically null: 1. Because the amount of the license is left to be determined by the council; 2. Because it is not alleged that the valuation roll contains an estimate of the defendant's business. This by-law is prior to the amendment made to Act 582 M.C. by 60 V., c. 62, s. 4:—Held, that in such a case, when it is alleged that defendant had acknowledged his liability, the Court will order evidence to be first taken on the merits (*preuve avant faire droit*) before deciding the demurrer. *Corporation of Ste. Anne* v. *Richard*, 14 Que. S.C. 77.

VI. Denial of Signature.

—Sale of land—Writing sous seing privé—False representations—Affidavit—Art. 145 C.C.P. (old text).]—Where a demand is based on a writing *sous seing privé*, and defendant pleads admitting his signature but that he was induced to sign the writing by false representations as to its contents, an affidavit to

accompany the plea under Art. 145 C.C.P. (old text) is not necessary and parol evidence may be admitted to support it. *Péloquin* v. *Genser*, 14 Que. S.C. 538, reversing 12 Que. S.C. 229, C.A. Dig. (1898) 347.

VII. Form of Plea.

—Cession de biens—Contestation of account—Insufficient allegations.]—In the contestation of the statement of an insolvent the insufficiency of the allegations should be raised by *exception à la forme* and not by *inscription en droit*. *In re Sauft*, 14 Que. S.C. 450.

—Irregular plea—Art. 108 C.C.P.—Advantage of plaintiff's irregularity.]—When the defendant has not complied with Art. 108 C.C.P., but on the contrary has put both negative and affirmative matter in the same paragraph of his plea, he cannot demand the enforcement of Art. 111, or take advantage of plaintiff's omission to expressly deny the affirmative portion of said allegations, the omission being largely due to the defendant's own failure to comply with Art. 108 C.C.P. *Kerr* v. *Sherbrooke Street Ry. Co.*, 15 Que. S.C. 362.

—Action by physician or surgeon—Want of allegation of capacity—Defence—Exception à la forme—Inscription en droit.]—In an action by a medical man for recovery of an account for professional services, the want of an allegation that he is duly registered according to law and has paid his annual fee to the College of Physicians and Surgeons of the Province of Quebec as required by Art. 3994 R.S.Q. should be met by an exception to the form and not by *inscription en droit*. *Marien* v. *Huot*, 15 Que. S.C. 455.

—Exception à la forme—Categorical answers—Arts. 111, 202 C.C.P.]—It is by an exception to the form that a party, either plaintiff or defendant, can invoke the defect in procedure which violates the provisions of Art. 202 C.C.P.—Failure to give a categorical answer, that is by "yes," "no" or "I do not know," to each allegation in the demand, defence or reply constitutes a defect in such procedure and affords ground for an exception to the form. The insufficiency of an allegation of a lawful fact in a claim or defence should be met by an exception to the form and not an *inscription en droit*. *Lemieux* v. *Le Monde Publishing Co.*, 2 Que. P.R. 71.

—Action against partnership—Separate defence—Exception to form.]—In an action against a partnership, one of the defendants may set forth, in a plea on the merits, that he is not a member of the defendant partnership, and such allegation will not be rejected as being a matter of exception to the form. *Harvey* v. *Mowat*, 2 Que. P.R. 212.

VIII. General Denial.

—Exclusion of other grounds of defence—Art. 202 C.C.P.]—The plaintiffs sued the City of Montreal for damages caused to their property by a flood and in the first allegation of their declaration stated that they were proprietors of the immovable in question. This was followed by other allegations setting out the fact of the flood and the damages claimed. The defendant met the action by a defence which, after claiming as to the first allegation that plaintiffs should have established by evidence of title or other legal proof, and with regularity, their right to the property in question and that defendant neither admitted nor denied the facts stated (*faits articulés*) and having denied the other allegations the defence set up many grounds of defence tending to the dismissal of the action or at least to a reduction of damages:—Held, that this defence did not constitute a general denial so as to exclude all other grounds of defence within the terms of Art. 202 C.C.P. *Valée* v. *City of Montreal*, 15 Que. S.C. 321.

And see hereunder, XVII.

IX. Inconsistent Pleadings.

—Denial of all allegations—Plea of compensation—Art. 202 C.C.P.]—A special denial of each of the allegations in a declaration does not exclude a plea of payment:—*Semble*, such a denial excludes a further plea of payment. *Martel* v. *Martel*, 2 Que. P.R. 11.

—General denial—Special denial of each allegation—Election—Art. 202 C.C.P.]—A special denial of each allegation in a plea is a general denial which excludes other replications and upon motion therefor the plaintiff will be ordered to elect between such denials and other allegations in his reply. *Leprairie* v. *Picard*, 2 Que. P.R. 44.

—Denial of each allegation—Other defences—Art. 202 C.C.P.]—If a plea first denies all the allegations in the declaration, and then sets up other grounds of defence, all the paragraphs following the first containing the denial will, on motion therefor, be rejected. *Gagné* v. *Charpentier*, 2 Que. P.R. 45.

—Position of defendant.]—A plaintiff may, by his declaration, claim a sum of money from the defendant as being the *mandant* of third parties to whom he had sold the goods and also as being their partner, these two positions not being incompatible. *Bourassa* v. *Lesperance*, 2 Que. P.R. 66.

—General denial—Subsequent allegations—Art. 202 C.C.P.]—A special denial of each of the allegations of the declaration is equivalent to a general denial and subsequent allegations will be rejected on motion; but the defendant will be allowed to substitute another defence for such general denial. *Denault* v. *Coulson*, 2 Que. P.R. 68.

X. Irregularity.

—Conditional allegations—Art. 202 C.C.P.]—Allegations setting forth causes of extinction of a debt subject to the condition that it ever

existed are not irregular and do not violate the provisions of Art. 202 C.C.P. *Meagher* v. *Meagher*, 2 Que. P.R. 94.

XI. Necessary Averments.

—Life insurance—Benefit association—Payment of assessments—Forfeiture—Waiver.]—A member of a benefit association died while suspended from membership for non-payment of assessments. In an action by his widow for the amount of his benefit certificate it was claimed that the forfeiture was waived:—Held, that the waiver not having been pleaded it could not be relied on as an answer to the plea of non-payment. *Allen* v. *Merchants Marine Insurance Co.*, 15 S.C.R. 488, followed. *Knights of the Macabees* v. *Hilliker*, 29 S.C.R. 397.

—Sale of mortgaged land for taxes—Purchase by mortgagor—Action to foreclose.]—Lands under mortgage were offered for sale by the municipality for arrears of taxes and purchased by the wife of the mortgagor. The tax sale certificate was afterwards assigned to L., who obtained a deed from the municipality. In an action against the mortgagor, his wife and L. for foreclosure the mortgagee alleged that the purchase at the tax sale was in pursuance of a fraudulent scheme by the mortgagors to obtain the land freed from the mortgage, and the trial judge so held in giving judgment for the mortgagee. The Court of Queen's Bench did not pronounce on the question of fraud, but affirmed the judgment on other grounds:—Held, that L. could not claim to have been a purchaser for value without notice, as such defence was not pleaded, and it was not a case in which leave to amend should be granted. *Lawlor* v. *Day*, 29 S.C.R. 441, affirming *Day* v. *Rutledge*, 12 Man. R. 290.

—Succession — Action against heir — Averment of renunciation — Registration — Inscription en droit.]—Where a party sued as heir by a creditor of the succession alleges that she has renounced the succession but does not allege registration of her renunciation, the allegation of renunciation may be rejected on *inscription en droit*. *Bell* v. *Garceau*, 15 Que. S.C. 239.

—Fire insurance policy—Construction of plea—Concealment of material fact—General averment.]—To the declaration on a policy of fire insurance, dated in 1893, issued by the defendant company, it was pleaded that it was made a condition precedent to its issue that it was based on the written representations and warranties contained in the application upon which a policy in the A. company was issued, and although in said application the plaintiff represented that there was no judgment or seizure against him at the time of the making of the said policy of insurance mentioned in said first count and before the said property was burnt, damaged or destroyed by fire, as alleged in said first count, there was a judgment against the plaintiff signed on the 15th day of June, 1891, and an execution for the amount of said judgment was in the hands of the sheriff at the time the property insured was burnt, and also at the time the defendant's policy was issued:—Held, that the plea was bad, as it did not allege that there was a representation at the time the policy declared on was issued that there was no judgment against the plaintiff, and, per Tuck, C.J., that in the absence of the date of the application to the A. company there was no evidence that the judgment against plaintiff was not obtained subsequently to the date of the application. To the above declaration the defendant company pleaded that the policy was subject to a condition indorsed upon it that it should be void if any material fact or circumstance, stated in writing or otherwise, had not been correctly represented by the assured, or if any fact material to the risk had been withheld, and that the plaintiff at the time of the making of the policy withheld the fact that said judgment had been signed against him. Held, that the plea was bad, it not being alleged that the fact withheld was material. To the above declaration the defendant company pleaded that subsequently to the making of the policy there was a change in the risk not made known to the defendants, and that by a condition of the policy, if the occupancy, situation or circumstances affecting the risk should, with the knowledge, advice, agency, or consent of the assured, be so altered as to cause an increase of the risk, then the policy should become void. Held, that the plea was bad for not alleging what the change in the risk was. *Long* v. *Phœnix Ins Co.*, 34 N.B. R. 223.

—Foreign prescription—Motion to reject answer—Arts. 2193, 2260 C.C.]—In an action for the recovery of a debt which would on its face have been prescribed under our law, but which is not prescribed according to the laws of the country where the cause of action arose, the foreign law must be alleged in the declaration, and an answer alleging it after a plea of prescription has been put in, will be rejected on motion. *Shattuck* v. *Tyler*, 2 Que. P.R. 143.

XII. Rejection of Plea.

—Costs—Condition of filing plea—Plea filed without payment—Acquiescence.]—Where certain costs were ordered to be paid by defendant as a condition of his filing a plea; but the plea was, in fact, filed without payment of said costs, that the plaintiff by not excepting to the regularity of the filing of the plea, but, on the contrary, answering the same, acquiesced in the filing thereof, and it was too late, a month afterwards, to question the regularity of the filing of the plea by moving for its rejection. *McGreevy* v. *Lapalme*, 15 Que. S.C. 61.

XIII. Réponse en Droit.

—Action by wife—Community—Plea of want of status—Reply—Proof.]—In an action by married woman for damages to a plea that being in community with her husband she cannot claim damages in her own name a *réponse en droit* will not be permitted and proof on the merits (*preuve avant faire droit*) will be ordered on such reply. *Marsau* v. *Larue*, 2 Que. P.R. 175.

XIV. Separate Defence.

—Bank—Joint action against bank and director—Costs of director—Separate defence.]

See Costs, IX.

XV. Special Indorsement.

— Writ of summons — Special indorsement — Nullity — Judgment.]

See Practice and Procedure, XXXVIII.

XVI. Statement of Claim.

—Extension of claim made in writ of summons—Rule 244.]—The writ of summons in an action by mortgagee against mortgagor was indorsed with a claim for an injunction to restrain waste. The statement of claim went further and claimed to recover possession of the land in respect of which the injunction was sought.—Held, that what was claimed by the pleading was an "extension" of what was claimed by the writ, within the meaning of Rule 244: *United Telephone Co.* v. *Tasker*, 59 L.T.N.S. 852, and *Cave* v. *Crew*, 41 W.R. 359, 3 R. 401 distinguished. *Smythe* v. *Martin*, 18 Ont. Pr. 227.

—Saisie-revendication—Declaration—Necessary averment—Affidavit—Exception.]—The declaration of a *saisie-revendication* should mention any other effects than those specified in the affidavit which should precede the writ, and the fact that the declaration might have added others, especially if the action has been made of a higher class thereby, is an irregularity of which the defendant may take advantage by *exception à la forme*. *Barron* v. *Vallée*, 15 Que. S.C. 238.

—Action on cheque—Presentment and protest.]—It is not necessary to allege, in an action based upon a cheque, that it was presented for payment within a reasonable time, at the place where it was made payable, and was refused and protested. *Deserres* v. *Euard*, 2 Que. P.R. 124.

—Seaman's wages—County Court Judge—Jurisdiction—Complaint.]—Under Revised Statutes of Canada, c. 74, s. 52, to enable a seaman to sue for and recover his wages, the complaint must shew all the facts and circumstances which, under the statute, give the Court jurisdiction, and unless such complaint does disclose all things necessary to give jurisdiction, it cannot be supplemented by evidence, and the judgment will be set aside. *Ex parte Andrews*, 34 N.B.R. 315.

—Allegation of judgment in another Court—Jurisdiction.]—Everything is intended in favour of the jurisdiction of a Superior Court; therefore, where the statement of claim in an action for possession of land alleged the recovery of a judgment in a County Court, the registration of a certificate thereof, the making of an order of the Court of Queen's Bench for the sale of the land under the judgment, and an order vesting the land in the plaintiff as purchaser:—Held, on demurrer, that for anything that appeared in the statement of claim, the order for sale might have been regularly made in an action in this Court, although at the date of the order there was no jurisdiction to make such an order except after an action commenced for that purpose, and that the demurrer should be overruled. Held, also, per Dubuc, J., (1) that the amendment to Rule 807 of the Queen's Bench Act, 1895, made by 60 V., c. 4, although made after the orders relied on, had the effect of validating them, if they had not been regular, as they had not been attacked in any way prior to its passing; (2), following *In re Padstow, etc., Association*, 20 Ch. D. 137, that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and the proper way to get rid of it, if it is erroneous, is to appeal against it, as in *Proctor* v. *Parker*, 11 Man. R. 485. *Ritz* v. *Fræse*, 12 Man. R. 346.

—Special indorsement.]—Where a statement of claim is required, if no other statement of claim is delivered, there must be a good special indorsement under Rule 15 (B.C.) to sustain a default judgment under Rule 242. *Hassard* v. *Riley*, 6 B.C.R. 167.

—Embarrassing statement of claim—General allegation of plaintiff's title.]—In an action by plaintiffs who have never been in possession to recover certain coal seams:—Held, that the statement of claim should state particulars of the title under which the plaintiffs claim. *E. & N. Railway Co.* v. *New Vancouver Coal Co.*, 6 B.C.R. 188.

XVII. Statement of Defence.

—Amendment—Partial abandonment of defence—Costs.]—In the statement of defence to an action under Lord Campbell's Act to recover damages for the death of plaintiff's husband, killed owing to the alleged negligence of the defendants, the defendants in their statement of defence denied that the plaintiff was the widow of deceased, but at the trial moved upon notice to withdraw that defence. The Chief Justice allowed the amendment, but imposed as a condition, against the consent of the defendants' counsel, that the defendants should pay the costs of the action up to and including the costs of the first day of

the trial:—Held, on appeal to the full Court, that the defendants had the right to withdraw any part of their defence upon payment of the costs thrown away by the plaintiff owing to that issue being raised. *Gordon* v. *City of Victoria*, 6 B.C.R. 129.

—Embarrassing statement of defence—General allegation of defendants' title.]—Statement of defence traversed allegations in the claim to the effect that plaintiffs were entitled to mine certain coal under the sea, without shewing the defendants' title in the defence, and further set up laches as an alternative defence:—Held, that the defendants were not bound to set forth their title in their statement of defence, but that particulars of the alleged laches ought to be stated. *Esquimalt and Nanaimo Ry. Co.* v. *New Vancouver Coal Co.*, 6 B.C.R. 306.

—General denial—Whether sufficient—New defence on appeal.]—The rules of pleading relating to denials specially considered and applied. The full Court will not allow a defence to be raised for the first time, based on non-compliance with the directions of the mineral laws relating to location. *Hogg* v. *Farrell*, 6 B.C.R. 387.

—Pleading statute—Two statutes entitled the same.]—Where there are two statutes, the short titles of which are identical, a defendant pleading one of them should make it plainly appear on which he relies, but he need not plead the particular section. *Kirk* v. *Kirkland*, 6 B.C.R. 442.

—Assault—Defence—Justification—Particulars.]—An application by the plaintiff to strike out a paragraph of the statement of defence as embarrassing. The action was for an assault, and the defendant pleaded that he was "a duly appointed policeman for the town of North Sydney, and in the course of his duty arrested the plaintiff, and did not use more force than was necessary to effect such arrest." This was pleaded as a defence to the whole statement of claim:—Held, that the paragraph must be struck out with costs as embarrassing and as being no answer to the action. It is not the duty of policemen to arrest except for cause, and the defence, being one of justification, must shew all facts necessary to justify the act of assault. [Townshend, J. (N.S.) in Chambers]. *Vickers* v. *Boyd*, 19 C.L.T. (Occ. N.) 362.

—Award—Setting aside pleas as false—Striking out part.]—See ARBITRATION AND AWARD, II.

XVIII. SUFFICIENCY OF PLEADINGS.

—Cession de biens—Contesting account—Conclusions—Exception à la forme—Inscription en droit—Arts. 885, 886, 888, C.C.P.]—On the contestation of the statement of an insolvent, concluding for the imprisonment of the latter, it is not necessary to demand by the conclusions, that the statement be declared false and fraudulent, nor to allege that the *contestant* proceeded within the delay of four months allowed by law for the contestation of the account; the latter ground, if well founded, defendant should plead by exception. *In re Sauft*, 14 Que. S.C. 450

—Allegation—Rejection—Mode of procedure.]—An allegation can only be rejected on motion when it is irregular in form; when it does not justify the conclusions of the parties its rejection should be demanded by *inscription en droit*. *O'Dell* v. *Bell*, 14 Que. S.C. 482.

—Demand of particulars—Facts alleged to be known to adverse party.]—A company was sued for damages by reason of an accident happening to plaintiff. The plea alleged "that the said accident was caused by a danger inherent to the work, of which plaintiff was aware and against which he had frequently been warned." Plaintiff moved for particulars, claiming that the words, "against which he had frequently been warned," were too vague:—Held, that the facts being precise and alleged to be to the knowledge of the plaintiff, there was no reason for ordering a more particular allegation, but it might be best to suspend judgment on the motion until the trial to enable the Court to grant a delay to the plaintiff in order that he might combat the evidence of the defendant if possible. *Bigras* v. *Montreal Water and Power Co.*, 15 Que. S.C. 145.

—Promissory note—Action before maturity—Insolvency of parties.]—In an action on a promissory note against the maker and the indorser, where it is alleged that both are insolvent, the indorser cannot demur on the ground that no presentment nor protest of the said note is alleged. *Banque Nationale* v. *Martel*, 2 Que. P.R. 35.

—Lottery—Contract—Averment of performance.]—The defendants by public advertisement, offered a piano as a prize to the person who would guess most nearly the weight of a large block of soap, exposed for that purpose at a public exhibition. Three persons were chosen to act as judges and determine the winner. It was also a condition that the participants in the contest should buy and give defendants' soap a fair trial:—Held, on demurrer, that the general allegation of the performance of all conditions necessary to entitle the plaintiff to recover was, on demurrer, a sufficient averment of the performance of such conditions. *Dunham* v. *St. Croix Soap Mfg. Co.*, 34 N.B.R. 243.

See CRIMINAL LAW.
" PRACTICE AND PROCEDURE.

PLEBISCITE.

—Prohibition Plebiscite Act., s. 6—Polling day—Sale of liquor—Dominion Election Act, s. 83.]

See ELECTION LAW.

POLICE MAGISTRATE.

—Justice of the Peace acting for.]

See JUSTICE OF THE PEACE, IX.

POST-MORTEM.

—Post-mortem examination—Withdrawal—Consent of County Crown Attorney.]

See CORONER.

POST OFFICE BOND.

—Postmaster's Bond—Defalcation—Laches of Government officials—Discharge of surety.]

See CROWN, IV.

POWER OF ATTORNEY.

—Transfer of obligation—Acceptance of signification by debtor—Action by transferee.]

See DEBTOR AND CREDITOR, III.

PRACTICE AND PROCEDURE.

I. ABANDONMENT.

—Abandonment of action—Offer to pay costs—Art. 275 C.C.P.]—The plaintiff filed an abandonment in these terms: "Le demandeur se désiste de son action en cette cause et en demande acte et en donne par les présentes avis à MM. Lafortune & Lamontague, avocat de la défenderesse."—Held, that this abandonment, though it contained no offer to pay the costs, was valid as an abandonment without conditions, and involves the payment of costs, and the defendant need only inscribe the cause for judgment to obtain a dismissal of the action with costs. *Brown* v. *Belleville*, 15 Que. S.C. 427.

—Abandonment before return of writ—Appearance—Congé-defaut.]—Signification of notice of abandonment (*désistement*) to the defendant before the day fixed for the return of the writ does not prevent the defendant appearing and asking for dismissal for default (*congé-defaut*) of the action. *Limoges* v. *Beauvais*, 15 Que. S.C. 429.

—Interdict—Attorney—Art. 223 C.C.P.]—An interdict for insanity who has taken pro-

ceedings in review from the judgment of interdiction, is incapable of abandoning such proceedings.—The abandonment being a nullity, his attorney cannot intervene in order to continue the proceedings for their costs. *Léveillé* v. *Laliberté*, 5 Rev. de Jur. 76.

II. Accounts.

—Decree for account—Varying certificate.]—If it appears on the taking of accounts that the decree is not drawn in such a way as to include all proper subjects, the proper practice is to apply to the Court to direct further and other accounts to be taken.—On a motion to vary a certificate, the parties are confined to the decree. *Van Volkenberg* v. *Western Canada Ranching Co.*, 6 B.C.R. 284.

III. Actions.

—Separation as to bed and board—Authorization — Attachment — Motion to reject.]—A wife whose action in separation as to bed and board has been rejected, cannot, without another authorization of the Court, take any other proceedings against her husband, and a *saisie-arrêt* issued without the authorization of the Court, will be dismissed on motion to that effect by the husband, defendant. *Emery* v. *Martel*, 2 Que. P.R. 264.

—Power of Court to extend time for payment of costs — Dismissal of action in default.]—The Full Court of British Columbia has power to, and will in a proper case, extend the time fixed by an order directing payment of costs, otherwise action to stand dismissed. *Dunlop* v. *Haney*, 6 B.C.R. 320.

And see Action.

IV. Admission.

—Admissions, their indivisibility — Merchants' books.—Debit and credit items.]—A statement of account when produced in a case, must be taken in its entirety, and the law recognizes the indivisibility of such a statement. Consequently, a party cannot therein select what is favourable to him and reject what is unfavourable. The debit and credit items must be taken as a whole, and as constituting together an *aveu* which is indivisible. *Delaney* v. *Love*, 14 Que. S.C. 40.

V. Affidavit.

— Attachment in revendication — Signature — Arts. 933, 947 and 948 C.C.P. — Clerical error in date—Amendment.]—A plaintiff will be allowed on motion to amend a purely clerical error in an affidavit by changing "1898" into "1899" as the year of the signature thereof when the body of the affidavit clearly puts the defendant in possession of the true facts and dates—plaintiff paying costs of motion to amend.—The affidavit for a *saisie revendication* need not be signed by the plaintiff, his bookkeeper, clerk or legal attorney. *McGregor-Gourlay Co.* v. *Labelle*, 2 Que. P.R. 93.

—Saisie-arrêt before judgment—Defective affidavit—Amendment—Prejudice.]—An allegation in an affidavit for the issue of a *saisie-arrêt* that "the plaintiff has every reason to believe, and truly believes, in his soul and conscience that the defendant intends to leave, and is on the point of soon leaving, the province," etc., is insufficient and a petition to have such a seizure quashed will be granted.—*Semble*:—An affidavit for a writ of *saisie-arrêt* before judgment may be amended.—In order to have a *saisie-arrêt* before judgment quashed it is not requisite that the irregularities of the affidavit required for its issue should cause prejudice to the defendant. *Ursie* v. *Charley*, 2 Que. P.R. 154.

— Person administering oath — Competence — Quo warranto—Arts. 980, 988 C.C.P.]—If the affidavit of the truth of the information required for the issue of a writ of *quo warranto* is sworn before a prothonotary of the Circuit Court there is ground for an exception to the form even after a Superior Court Judge, on such information, has authorized the issue of the writ. *Lavoie* v. *Jeffrey*, 2 Que. P.R. 229.

—Swearing before ante litem solicitor—Validity.]—The affidavit of a party to a suit sworn before an *ante litem* solicitor in his employ, acquainted with the facts of the case, although not the solicitor on the record, is insufficient under B.C. Rule 417. *Dunsmith* v. *Klondike & Columbian Gold Fields Co.*, 6 B.C.R. 200.

—Affidavit sworn before solicitor's agent resident outside province—B.C. Rule 417.]—An affidavit sworn before a notary public in Manitoba, who had been acting as agent for defendant's solicitor is insufficient under Rule 417. *McLellan* v. *Harris*, 6 B.C.R. 257.

—Affidavit for capias.]

See Debtor and Creditor, II.

—Saisie-Arrêt before judgment—Non-service of affidavit—Prejudice—Exception à la forme.]

See Saisie-Arrêt.

—Affidavit for order for service out of jurisdiction.]—See hereunder, LIII.

VI. Amendment.

— Inscription in law — Motion to dismiss — Amendments to defence—Delays.]—Under the present Code of Procedure, the inscription in law is part of the defence and must be filed at the same time as the latter. But on the other hand, the whole defence may be not only amended but may be changed. Therefore, a defendant who files a defence on the fact can subsequently substitute for it one on the law of the case, provided the same be asked for before the plaintiff has replied to his original defence, or inscribed the case on the merits. *Bourget* v. *Colonial Mutual Life Association*, 15 Que. S.C. 209.

— Demand of abandonment — Affidavit — Prejudice.]—A demand of abandonment made on one Alphonse Charlebois, therein described under the name of Charles Alphonse Charlebois, and the affidavit in support of the same may be amended by striking out the word "Charles" wherever it appears, the debtor suffering no prejudice by such description. *Taché* v. *Charlebois*, 2 Que. P.R. 47.

—Costs.]—In an action claiming damages for an accident the plaintiff, after the filing of a *défense en droit*, will be permitted to add allegations of negligence on the part of defendant on payment of the costs of the motion to amend, the expenses on a motion to reject the amendment and the fee on the amendment; but the *défense en droit* will be dismissed with costs if the grounds for dismissal of the action, except such as gave rise to the amendment, are unfounded. *Kehoe* v. *Paradis*, 2 Que. P.R. 59.

—Petition for quo warranto — Description of petitioner.]—*Semble:* A motion to amend the description of petitioner in the petition and affidavit for a writ of *quo warranto* accompanied by an affidavit stating that the defect is simply a clerical error should be granted. *Poliquin* v. *Martel*, 2 Que. P.R. 60.

— Saisie-arrêt — Affidavit for.]—*Semble:* The affidavit for the issue of a writ of *saisie-arrêt* before judgment may be amended. *Ursie* v. *Charley*, 2 Que. P.R. 154.

—Form of action—Change of form—Arts. 513, 522 C.C.P.]—A plaintiff will not be allowed, after defendant has appeared, an amendment changing an ordinary action into a summary action. *Jamieson* v. *Needham*, 2 Que. P.R. 245.

—Husband and wife—Wife separate as to property—Action—Authorization of husband—Leave to amend writ.]—See ACTION, III.

—Motion to reject—Stamps—Deposit.]

See hereunder, XL.

— Revendication — Affidavit for attachment — Clerical error.]—See hereunder, V.

VII. APPEARANCE.

—Time for appearance—Art. 161 C.C.P.]—Two defendants were sued jointly and severally. One was summoned on the 6th to appear within a delay of six days, and the other was summoned on the 8th to appear within seven days. The defendants produced a joint appearance, by the same attorney, on the 15th, which the prothonotary would not receive:—Held, that the appearance would be admitted under the circumstances, but without implying that the prothonotary was wrong in refusing to receive it. *Marsan* v. *Davelay*, 15 Que. S.C. 232.

—Irregular appearance — Judgment — Setting aside.]—Where an irregular appearance has been entered, the plaintiff cannot treat it as a nullity and sign judgment as in default, but must move to set it aside. *Gordon* v. *Roadley*, 6 B.C.R. 305.

VIII. APPELLATE COURT.

—Jurisdiction—Special leave—Cross-appeal to Privy Council—Stay of proceedings.]—In an order granting special leave to appeal to the Supreme Court of Canada under the provisions of the forty-second section of the Supreme and Exchequer Court Act after the expiration of the time limited by the fortieth section of the Act, it is not necessary to set out the special circumstances under which such leave to appeal has been granted nor to state that such leave was granted under special circumstances. Where the appellant had inscribed an appeal for hearing in the Supreme Court of Canada after he had received notice of an appeal taken in the same matter by the respondent to the Privy Council upon motion on behalf of the respondent the proceedings on the Supreme Court appeal were stayed with costs against the appellant pending the decision of the Privy Council upon the respondent's appeal. *Eddy* v. *Eddy*, Coutlée's S.C. Dig. 23 followed. *Bank of Montreal* v. *Demers*, 29 S.C.R. 435.

—Inscription on appeal.—Art. 1213 C.C.P.]—The inscription in appeal to the Court of Queen's Bench should be filed at the office of the prothonotary of the Court which has given the judgment appealed from before service of the notice of appeal and of security on the opposite party or his attorney. *Garon* v. *Noel*, 2 Que. P.R. 26.

IX. ATTACHMENT.

—Contestation of saisie-arrêt after judgment—Non-indebtedness—Costs.—Arts. 678, 681, 688 C.C.P.]—The non-indebtedness of the garnishee is a good ground for the defendant to urge for the quashing of a writ of *saisie-arrêt* after judgment and the defendant can raise it before the plaintiff has decided whether he will contest the garnishee's declaration. The quashing of a writ of attachment after judgment must be demanded by motion, and, if the defendant urges it by way of contestation, the only costs taxed in his favour will be costs upon an appearance and a motion only. *Pallascio* v. *Champeau*, 2 Que. P.R. 218.

And see DEBTOR AND CREDITOR, V.

X. CAPIAS.

—Allegations of affidavit—Petition to quash—Arts. 895 and 898 C.C.P.]—A capias will be quashed on petition to that effect, if the plaintiff does not allege in his affidavit that by the secretion or intended departure of the defendant he will be deprived of his recourse against him. *Filiatrault* v. *Piché*, 2 Que. P.R. 289.

And see DEBTOR AND CREDITOR, II.

XI. CERTIORARI.

—Writ of certiorari—Deposit—Art. 1074, R.S.Q.]—No writ of certiorari can issue against a conviction for selling liquor without license if the applicant therefor has not previously conformed to the provisions of Art. 1074 R.S.Q. by making, within eight days from the conviction, a deposit with the proper official of the entire amount of the fine, all the costs and an additional sum of fifty dollars as security for future costs. *Thivierge* v. *Desilets*, 5 Rev. de Jur. 176.

— Conviction for using profane language on public street — Quashing — Certiorari — Costs.]—Defendant was convicted by the stipendiary magistrate of the City of Halifax, for that she "in said City of Halifax . . . , being in one of the public streets of the said City of Halifax, did openly use profane language." The words complained of, and upon which the conviction was founded, were not set out in the summons, information, or conviction. The conviction having been brought up by writ of *certiorari*:—Held, following *The Queen* v. *Bradlaugh*, 3 Q.B.D. 607, that the conviction was bad and must be quashed, on the ground stated. The motion for the *certiorari* was opposed by counsel acting for the stipendiary magistrate of the city, and the informant, one of the police of the city. The motion having been allowed with costs, to be paid by the stipendiary magistrate and the informant. On appeal from that part of the order which awarded costs; Held, dismissing the appeal, that as the stipendiary and the informant could have avoided all liability by not opposing the motion for the writ, and as the question of costs was in the discretion of the judge to whom the application was made, who, in this case, had followed the usual course, by directing them to be paid by the unsuccessful party, there was no reason for reviewing his discretion. Per Meagher, J.; Held, that the costs allowed should be confined to the costs occasioned by opposing the motion at Chambers. *The Queen* v. *Smith*, 31 N.S.R. 468.

—Costs of Crown—Practice in British Columbia.]—The practice in *certiorari* proceedings of never awarding costs either in favour of or against the Crown is to be considered as no longer in force in British Columbia. *The Queen* v. *Little*, 2 Can. C.C. 240, 6 B.C.R. 320.

— Recognizance — Sufficiency of justification — Appeal.]—See CRIMINAL LAW, II.

XII. COMMISSIONERS' COURT.

—Written plea—Postponement of hearing—Art. 1275 C.P.—Certiorari.]—If a written defence is filed to an action before the Commissioners' Court, the trial must be postponed, and if the case is tried on the return day of the action, in the absence of the defendant and his counsel, a writ of *certiorari* will lie against the commissioners to set aside the judgment therein. *Crevier* v. *Banque Ville Marie*, 2 Que. P.R. 49.

—Appearance and plea—Postponement for trial —Art. 1275 C.C.P.]—In an action in the Commissioners' Court, where the defendant has appeared and filed a plea, he is entitled, under Art. 1275 of the Code of Civil Procedure, to have the case continued to a subsequent day for trial, and a judgment pronounced against him on the same day that he appears, is illegal and will be set aside. *Crevier* v. *Brassard*, 15 Que. S.C. 236.

XIII. CONSOLIDATED CAUSES.

— Enquête — Inscription — Deposit — Art. 1197 C.C.P.]—If two causes are consolidated at first instance for purposes of *enquête*, they remain consolidated, can be decided by one judgment, and a single inscription in review and a single deposit are sufficient. *Cabana* v. *Union St. Joseph*, 2 Que. P.R. 201.

XIV. CONTEMPT OF COURT.

—Injunction — Breach — Form of motion.]—In proceeding for contempt for breach of an injunction order restraining the doing of an act, the proper course is to move that the party in contempt stand committed, notice of the motion having been first personally served upon him, and not to move that he shall shew cause why he shall not stand committed or why an attachment shall not issue against him. *Poirier* v. *Blanchard*, (No. 2.) 1 N.B. Eq. 605.

And see CONTEMPT OF COURT.

XV. CONTRAINTE PAR CORPS.

See title, CONTRAINTE PAR CORPS, *ante*.

XVI. COUNTY COURT PRACTICE.

See COUNTY COURTS.

XVII. DECLARATION OF RIGHT.

—Special forum — Rights of parties — Declaration.]—Where a special forum is created by statute for determining rights of parties, a declaration of right will not be made by the Court under s. 57, s.s. 5 of the Judicature Act, in an action which the Court has no jurisdiction to entertain. *Attorney-General* v. *Cameron*, 26 Ont. App. 103.

And see REVENUE.

XVIII. DELAYS.

—Peremption d'instance—Reduction of term—Art. 279 C.C.P. — Retroactivity.]—Art. 279 of the new code of civil procedure, which reduces the term of the *peremption d'instance* to two years, does not apply retroactively to a cause in which the time began to run under the former code. *Charette* v. *Howley*, 14 Que. S.C. 481.

—Benefit of inventory—Delay to plead.]—A defendant sued as universal legatee under a

will, after the expiration of the delays granted by the Code, cannot by motion, unaccompanied by deposit, ask for delay to plead, for the purpose of securing benefit of inventory. *Bell* v. *Garceau*, 15 Que. S.C. 266.

—Jury trial—Inscription—Art. 442, C.C.P.]—Under the new Code of Procedure, the expiration for the party who has demanded a trial by jury, of the delay of thirty days following that on which the cause is ready for trial, bars his right to such proceeding. But, for the adverse party, the delay is extended for fifteen days longer (Art. 442, C.C.P.) to enable him to proceed to a trial by jury, if he wishes to avail himself of his adversary's demand. If he does not desire to do so, he can *de plein droit* inscribe for evidence and hearing in the usual manner, so soon as his adversary is foreclosed from proceedings by the expiration of the said delay of thirty days. *Goulet* v. *Landry*, 15 Que. S.C. 569.

—Appearance and plea—Abandonment of action—Costs—Art. 197 C.C.P.]—A writ was returned on Jan. 5th, and on Jan. 10th the defendant, by consent of plaintiff's attorney, filed an appearance on Jan. 12th, defendant's attorney prepared the defence and submitted it to plaintiff's attorney, asking them to accept a copy, and it would be filed later. On Jan. 13th plaintiff caused to be served and filed an abandonment of the action in advance of the filing of the defence, which took place on the 14th:—Held, that under these circumstances the six days allowed by Art. 197 C.C.P. for pleading should be reckoned only from Jan. 10th, and that defendant had a right to the costs and disbursements on the pleas. *Brown* v. *Belleville*, 15 Que. S.C. 576.

—Opposition—Motion for examination—Art. 651, C.C.P.]—A motion for an order to examine the *opposant* should be made within the four days following the service of the notice of the return of the opposition, and cannot be entertained after the expiring of that delay, even if preceded by a motion to dismiss the opposition which was granted as to the costs, and made within the four days following the judgment on the latter motion. *Tufts* v. *Langelier*, 2 Que. P.R. 13.

— Amendment—Service—Art. 523 C.C.P.]—If the judgment allowing an amendment does not fix the time within which it is to be served, and service is not made within three days after the order, the Court cannot permit it to be served after the expiration of said three days, but will dismiss with costs a motion asking for such permission. *Lemieux* v. *Lemieux*, 2 Que. P.R. 25.

—Opposition—Motion to dismiss.]—The motion for the dismissal of an opposition, wholly or in part, even when it is in the nature of an exception to the form, is not subject to the delays fixed for exception to the form, but is governed by special articles of the code applying thereto. *Baynes* v. *Honan*, 2 Que. P.R. 186.

—Account—Failure to signify—Advantage of—Art. 176 C.C.P.]—Failure by the plaintiff to signify the account sued on must be invoked within the delays fixed for preliminary exceptions, and a motion by defendant after such delay to be relieved, in consequence of this default, of the foreclosure entered against him, will be rejected. *Sorgius* v. *Dupéré*, 2 Que. P.R. 208,

—Particulars—Motion to reject.]—A motion to reject as insufficient the particulars ordered will be dismissed if made after the expiration of three days from their receipt. *Underwood* v. *Childs*, 2 Que. P.R. 249.

—Appeal—Security—Extension of time—Art. 1213 C.C.P.]—See APPEAL, X.

XIX. DEPOSIT.

—Notice of deposit—Certificate—Art. 165 C.C.P.]—A notice of the deposit made with a preliminary exception is insufficient unless accompanied by a copy of the prothonotary's certificate of the deposit having been made. *Cherval* v. *Cordollaz*, 2 Que. P.R. 222.

—Motion for particulars—Exception to the form—Art. 165 C.C.P.]—When the motion for particulars does not amount to an exception to the form, no deposit is required with it. *Oldall* v. *Taylor*, 2 Que. P.R. 288.

—Non-service of writ—Motion to dismiss action—Failure to make deposit—Indulgence.]—If a defendant, moving for an exception to the form with a view to dismissal of the action for want of proper service, does not make the deposit within three days from the return of the action the Court in session will permit it to be made when he presents his motion. *Longpré* v. *Perkins*, 2 Que. P.R. 307.

XX. DISCOVERY AND PRODUCTION OF DOCUMENTS.

—Examination of officer of railway company—Roadmaster.]—In an action for damages for the death of the plaintiff's husband, who was killed while on duty as a fireman on a train of the defendants, an incorporated company, owing to the displacement of a switch:—Held, that the roadmaster in charge of the section of the line in which the accident occurred, although he was under the control of the chief engineer, was an officer of the company examinable for discovery. *Casselman* v. *Ottawa, A. & P. S. Railway Co.*, 18 Ont. Pr. 261.

—Examination of officer of company for discovery—Duty to obtain information from servants—Privilege.]—Upon the examination for discovery of an officer of an incorporated company, in an action brought against the company by a person whose building they

supplied with electric power, to recover damages for injury by fire which he alleged to have been caused by their negligence, the deponent, being asked whether on the date of the fire there was any indication at the power house or the defendants' works that there was any trouble or breakage in the wires on the circuit by which power was supplied to the plaintiff, answered that there were such indications:—Held, that he was bound to answer the further question as to what the indications were, if he had knowledge of the facts; and if he had not such knowledge, but could obtain it from a servant of the defendants who acquired the knowledge in the course of his employment, he was bound to obtain it so as to enable him to answer the question; and even if the information which the deponent had was obtained for the purpose of enabling counsel to advise, and he could claim privilege for it, he was bound, nevertheless, to obtain the information anew for the purposes of discovery. *Harris* v. *Toronto Electric Light Co.*, 18 Ont. Pr. 285.

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

—Examination of party resident out of Province —Order for — Enforcement—Member of Parliament—Attachment—Striking out defence—Rules 443, 454, 477.]—Where a defendant resides out of Ontario, and is only in it for a temporary purpose, his attendance to be examined for discovery can only be obtained, under Rule 477, by a Judge's order upon notice, and not by appointment under Rule 443.—An order was made under Rule 477 for the examination in Ontario of a defendant who resided in British Columba and who was temporarily in Ontario attending the meetings of the House of Commons of Canada, of which he was a member.—Although this order could not be enforced by attachment against the defendant while the House was in session, in the event of his refusing or neglecting to attend, it could be enforced, under Rule 454, by striking out his defence. *Cox* v. *Prior*, 18 Ont. Pr. 492.

—Examination of parties—Inscription—Interval to hearing.]—The parties to a cause may be examined as witnesses between the date of the filing of the inscription and that fixed for the *enquête*. *Morris* v. *Blythe*, 14 Que. S.C. 150.

—Action for séparation de corps—Examination —Reconciliation.]—On petition of the wife in an action against her husband for *séparation de corps*, asking that he be restrained from seeking and annoying her, the husband will not be permitted to set up an alleged reconciliation between them, and examine his wife as to the fact thereof. *Loiselle* v. *Parent*, 14 Que. S.C. 164.

—Deposition of party taken before trial—Art. 286 C.C.P.—Motion to dismiss opposition.]—Where a party is examined before trial, under Art. 286 C.C.P., the deposition so taken cannot be used as evidence to support a motion for the dismissal of an opposition filed by said party, if he be still in the province, and can be produced at the trial. *Demers* v. *Mathieu*, 14 Que. S.C. 249.

—Compelling production—Costs.]—The plaintiff who does not file with his writ and declaration the documents which he relies on to support his claim can be compelled, on motion therefor, to do so, with costs. *McCormick* v. *Irvine*, 2 Que. P.R. 44.

—Hypothecary action—Declaration of non-ownership—Art. 2059 C.C.]—The defendant, in an hypothecary action, who declares in his defence that he has only the possession of the hypothecated immovable, will not be compelled, upon motion therefor, to disclose his title to such possession or the name of the owner of the immovable. *Valiquette* v. *Forget*, 2 Que. P.R. 116.

—Examination on discovery—Arts. 286, 287 C.C.P.]—On an examination for discovery, questions relating to facts not alleged in the pleadings will not be allowed. *Richelieu & Ontario Navigation Co.* v. *Canadian Pacific Ry. Co.*, 2 Que. P.R. 260.

—Appointment for discovery—Service on solicitor—Witness fees—Manitoba Queen's Bench Act, 1895.]—It is not sufficient service of an appointment on the solicitor of a party to be examined for discovery under the Queen's Bench Act, 1895, to push it under the door of his office in his temporary absence, when it first comes to his notice on his return to his office within 48 hours of the time set for the examination, and the party in such case will be excused for not attending in obedience to a subpoena served upon him for such examination. Under Rule 381 of the Act, a party subpoenaed to attend on such an examination should be paid not only his railway fares or mileage both ways, but also his witness fees for as many days as he will certainly be absent from his home in attending on the examination and returning home. *Unger* v. *Long*, 12 Man. R. 454.

—Examination for discovery—Right of defendant to withhold names of his witnesses.]—A party is not, upon his examination for discovery under B.C. Order LXI., bound to disclose the names of his witnesses. The defendant in an action for maliciously swearing out a search warrant was asked upon such an examination to give the names of the persons upon whose information he proceeded as constituting reasonable and proper cause for his action, which he refused to do. On an application under Rule 715 to strike out his defence for such refusal:—Held, following *Smith* v. *Greey*, 10 Ont. Pr. 482, that there should be a fair disclosure of the line of defence contemplated but no identification of persons such as would enable the opposite party to fix upon the defendant's witnesses and that the refusal was justified. *Jones* v. *Pemberton*, 6 B.C.R. 69.

—Not obtainable as of right.]—A party in an action is not entitled as of right to an order for discovery of documents by the opposite party, but must shew to the Court *prima facie* that there are documents to be discovered, and that they are material to the issue. An application to examine a party before trial under Rule 708 should be supported by affidavit. *Elson* v. *Canadian Pacific Ry. Co.*, 6 B.C.R. 71.

—Cross-examination.]—An examination for discovery should be conducted as an examination in chief and not as a cross-examination. *Carroll* v. *The Golden Cache Mines Company*, 6 B.C.R. 354.

—B.C. Order XXXI., Rule 12, Order XIX., Rule 6.]—The Court has discretion to order defendant to make an affidavit of documents before delivery of defence for the purpose of enabling the plaintiff to give particulars of charges of fraud made in the statement of claim. *Beauchamp* v. *Muirhead*, 6 B.C. R. 418.

XXI. Distribution.

— Report of distribution — Contestation — Evidence.]—On a contestation of a report of distribution, which is merely a demurrer to the conclusions of the prothonotary, a party answering will not be allowed to allege new facts, nor to produce exhibits not before the prothonotary when the report was prepared. *Hinman* v. *House*, 15 Que. S.C. 193.

XXII. Division Courts Practice.

— Jurisdiction — Notice disputing — Extending time—Prohibition.]—See Division Courts.

XXIII. Equity Practice.

—Injunction—53 V., c. 4, s. 23 (N.B).]—A bill in equity praying for an *ex parte* injunction must be supported by affidavit.]—*Glasier* v. *MacPherson*, 34 N.B.R. 206.

—Consolidation of suits—Costs, how taxed—Stenographer's notes].—In equity proceedings, where there are several suits and they have been carried on as one proceeding, and the Judge in equity so declared, although no formal order on consolidation was made or taken out:—Held, per Tuck, C.J., and Landry, J. (VanWart, J., dissenting), that the suits must be considered as consolidated, and that the order of the Equity Judge giving but one set of costs for all the suits, was right.—Per Landry, J.: That the Judge's statement of what took place at the hearing must prevail over the stenographer's notes. *Consolidated Electric Co. Cases*, 34 N.B.R. 334.

—Motion to take bill pro confesso—Clerk's certificate—Service.]—A motion to take a bill *pro confesso* for want of a plea, answer or demurrer, will be allowed, though a copy of the clerk's certificate of the state of the cause has not been served upon the defendant. *MacRae* v. *MacDonald*, N.B. Eq. Cas. 498, not followed. *Godefroi* v. *Paulin*, 1 N.B. Eq. 568.

XXIV. Evocation.

—School rates—Action in Circuit Court—Arts. 49, 54, 55 C.C.P.]—There is no right of evocation to the Superior Court of an action brought in the Circuit Court for recovery of school rates even when such action affects future rights. *School Commissioners* v. *City of St. Henri*, 14 Que. S.C. 144.

— Footway — Repair — Future rights — Art. 49 C.C.P.]—A municipality, by action in the Circuit Court, claimed from a ratepayer $54, of which $45 was for the construction of a footway below his property by virtue of a municipal by-law and the balance 20% on the cost of the works. The defendant pleaded that he had satisfied all the obligations imposed upon him by the by-law in making the footway once, and he was not bound to do the work a second time, and he demanded the evocation of the action into the Superior Court as affecting his rights in future:—Held, that the future rights were affected as if he were condemned to reconstruct the footway now he might be condemned anew to do so at any future time and it was, therefore, a case for evocation. *Corporation of Belœil* v. *Jeannotte*, 14 Que. S.C. 211.

—Action for price of stock in company—Defence—Arts. 49, 1130 C.C.P.]—An action to recover payment of the first payment for stock subscribed in a company may be evoked by a defendant who pleads false representations, want of satisfaction and want of certificate. *Dewitt-Langlois Milling Co.* v. *Fanteux*, 2 Que. P.R. 141.

—Agreement for sale—Resolutory clause—Instalments of price—Arts. 49, 1130 C.C.P.]—In an action for two instalments due under an agreement for sale with a resolutory clause, the defendant who desires to plead that the default in paying these instalments has had the effect of determining the contract, and

that plaintiff has no right to recover the amount, is entitled to evoke the cause into the Superior Court. *Picard* v. *Renaud*, 2 Que. P.R. 183.

XXV. Exception to the Form.

—**Action on promissory note—Wife separated as to property—Authorization—Art. 176 C.C.**]—An action on a promissory note against a wife separated as to property (*separée de biens*) without her husband having been brought into the cause to authorize it, will not be dismissed on exception to the form, but must be met by *inscription en droit* or a plea to the merits. *Richard* v. *Bernard*, 2 Que. P.R. 178.

—**Interdict—Prothonotary's order—Review—Mode of proceeding.**]—The curator who opposes the revision of an order of the prothonotary pronouncing an interdiction, claiming that the revision should be demanded by action and not petition, should present his objection by an exception to the form and not by *inscription en droit*. *Re Bond*, 2 Que. P.R. 240.

XXVI. Ex Parte Proceeding.

—**Failure to plead—Foreclosure—Delay.**]—Under Art. 205 C.C.P. it is not necessary to apply for nor obtain a certificate of foreclosure against the party in default to plead, and the delays having expired, the defendant who has not pleaded is, *de plein droit*, foreclosed from so doing except by consent of the opposite party or permission of the Judge, and the plaintiff may inscribe his cause *ex parte* for *enquête* and merits.—Art. 205 C.C.P. differs from Art. 162, which provides that, in case of default to appear, the plaintiff can only proceed to judgment after having such default registered by the prothonotary. *Paradis* v. *Grand Trunk Ry. Co.*, 15 Que. S.C. 467.

XXVII. Forum.

—**Husband and wife—Séparés de biens—Joint demand—Defamation—Jurisdiction—Art. 54 C.C.P.**]—A husband and wife separated as to property (*séparés de biens*) jointly sued the defendant claiming $100 as damages for defamation:—Held, that this joint demand was in reality a demand of $50 for each of the plaintiffs, and therefore within the exclusive jurisdiction of the Circuit Court to which it was remitted. *Campbell* v. *Kavanagh*, 15 Que. S.C. 80.

And see Forum.
" " Jurisdiction.

XXVIII. Garnishee.

—**Dissolution of company—Action against bankrupt—Garnishee order.**]—See Company, V.

—**Money paid into Court by garnishee—Interpleader—Primâ facie evidence of third party's right—Setting aside garnishing order.**]

See hereunder, Interpleader.

XXIX. Habeas Corpus.

—**Copy of commitment—Affidavit.**]—The provisions of s. 4, c. 95, C.S.L.C., as to form of application, do not apply to the demand for *habeas corpus* in criminal matters, when a certified copy of the commitment is produced with the application; and no affidavit is required when the grounds urged appear on the face of the commitment. *Ex parte Robinson*, 5 Rev. de Jur. 271.

And see Habeas Corpus.

XXX. Injunction.

—**Interim injunction—Undertaking for damages—Foreign plaintiff.**]—Where a plaintiff before prosecuting an action is required to give security for costs, as where he resides out of the jurisdiction, he must also give the undertaking for damages of a responsible person within the jurisdiction as one term of getting an interlocutory injunction. *Delap* v. *Robinson*, 18 Ont. Pr. 231.

—**Interlocutory injunction—Undertaking as to damages.**]—An undertaking as to damages ought to be given by a plaintiff who obtains an interlocutory order for an injunction, not only when the order is made *ex parte*, but even when it is made upon hearing both sides. *New Vancouver Coal Co.* v. *E. & N. Railway Co.*, 6 B.C.R. 222.

—**Cross-examination of plaintiff on his affidavit—Discretion of Court or Judge.**]—As a general rule an order under Rule 401 will not be made for the attendance for cross-examination of a plaintiff who has made an affidavit leading to an interim injunction before the defendant fyles an affidavit of merits. *Leavock* v. *West*, 6 B.C.R. 404,

—**Right of County Court to issue.**]

See County Courts.

—**Patent for invention—Interim injunction—Undertaking to keep account.**]

See Patent for Invention, I.

XXXI. Inquisition.

—**Lunacy—Inquisition terminated by death before verdict—Costs.**]—See Lunacy.

XXXII. Inscription.

—**Inscription in review—Signature—Another person signing for attorney.**]—An inscription in review, signed by another person in the name of the attorney under authority from the latter, is valid, provided the opposite party is not prejudiced thereby. *Cantin* v. *Belleau*, 15 Que. S.C. 7.

XXXIII. Inspection of Mine.

—**Coal areas—Inspection of workings—Order for.**]—Plaintiffs claiming title to certain coal fields which were being worked by the

defendants applied before pleading for an order for inspection of the defendants' workings. Defendants admitted working within the area claimed by the plaintiffs:—Held, by Walkem, J., that the plaintiffs were entitled to have inspection, and by their own agents. Held, on appeal, (1) The chief ground on which such an order is made is to enable the plaintiff to get on with his case; (2) Under special circumstances, as where there is danger of flood, the order may be made to preserve the evidence; (3) That the inspection should be by indifferent persons, who should not reveal any information without the sanction of the Court. *E. & N. Railway Co.* v. *New Vancouver Coal Co.*, 6 B.C.R. 194.

—Mine—Continuous vien—Order for inspection.] See MINES AND MINERAL, IV.

XXXIV. INTERPLEADER.

—Seizure by sheriff under execution—Landlord's claim for rent—Sheriff acting in interests of execution creditor—Delay—Order—Issue.]—A sheriff, having in his hands a writ of *fi. fa.* against the defendant's goods, on the 23rd June, 1898, went into the hotel of which the defendant was the tenant, with the execution, and informed the defendant that he seized his furniture and effects. He then made a pencil memorandum of a number of articles stated to be in the house, first notifying the judgment debtor that everything was under seizure, and accepting his verbal undertaking to hold it for him. This course was pursued in accordance with instructions from the solicitor for the execution creditor, in order to endeavour to get the defendant to make payments on account of the execution. On the 8th August the landlords of the defendant put in a bailiff to seize the same furniture and effects for rent due on the 6th August. The bailiff spoke to the sheriff, who said that he would not undertake to sell the goods and pay the rent. Nothing further was done until the 6th October, 1898, when the landlords put another distress warrant into the bailiff's hands for rent since accrued. The sheriff was notified of this in writing on the 29th October, and on the 7th November, 1898, he swore to an affidavit upon which he applied for an interpleader order, and in which he stated that he had remained in possession from the 23rd June until the time of application. Being cross-examined, he said that he was holding on till the landlords put him out of the place:—Held, upon the evidence, that the sheriff had been acting throughout in the interest of the execution creditor as against the interest of the claimants, and for this reason, as well as for his delay, was not entitled to an interpleader order. *Flynn* v. *Cooney*, 18 Ont. Pr. 321.

—Evidence—Admissions of judgment debtor as between his creditor and a third party—Garnishment.]—In an interpleader issue between a garnishing creditor and a third party claiming the attached money, evidence of an admission of the judgment debtor as to the right to the money is not admissible in favour of the third party: *Bertrand* v. *Heaman*, 11 Man. R. 205, followed. Where the garnishee has paid the attached money into Court, a third party claiming it has no right, under ss. 261 or 266 of The County Courts Act. R.S.M. c. 33, on the trial of an interpleader issue, without giving some proper *primd facie* evidence of his right to the money or debt, to apply to set aside the garnishing order, or to raise the question whether the debt was properly attachable under the Act. The claimant was granted leave to have a new trial of the issue on payment of costs. *Marshall* v. *May*, 12 Man. R. 381.

—Interpleader summons—Service out of jurisdiction.]—The Court cannot grant an interpleader summons to be served out of the jurisdiction. [Per Townshend, J. (N.S.) in Chambers.] *Re Mutual Life Insurance Co.*, 19 C.L.T. (Occ. N.) 362.

—Admiralty law—Ship in possession of receiver—Seizure under fi. fa. of part of equipment—Interpleader.]—See SHIPPING, VIII.

XXXV. INTERROGATORIES.

—Husband and wife—Séparation de biens—Art. 359 C.C.P.]—The husband separated as to property who is in the cause only to authorize his wife cannot be interrogated *sur faits et articles*. *Price* v. *Marcotte*, 14 Que. S.C. 146.

—Interrogatories on faits et articles—Contents of documents.]—Where the interrogatories on *faits et articles* submitted to a party refer to the contents of documents and deeds not the personal titles of the party and not shewn to be in his possession, his answer that he is an illiterate man and is not aware of the contents of said documents is sufficient. *Thompson* v. *Pinsonneault*, 15 Que. S.C. 621.

—Penal action—Interrogatories sur faits et articles.]—In an action for a penalty, e.g. for non-payment of a license fee, which concludes for the delinquent to be imprisoned, the latter may refuse to answer interrogatories *sur faits et articles* and such interrogatories will not be declared *pro confessis* for his default; if there is no other proof the action will be dismissed. *Lambe* v. *Brown*, 2 Que. P.R. 70.

XXXVI. INTERVENTION.

—Motion to reject contestation—Payment of fees—Capacity of intervenant to move—Acceptance of offer.]—A motion by the defendant, asking that the plaintiff's contestation should be rejected from the record because it had not been paid for, was refused because the intervenant had not declared her acceptance or rejection of the plaintiff's offer to withdraw the seizure on payment of the costs

thereof, which offer had been made in good faith. *Budden* v. *Rochon*, 14 Que. S.C. 10.

—**Reception—Filing.**]—An intervention need not be received by the Court or a Judge before being filed. *Berthelet* v. *Gagnon*, 15 Que. S.C. 146.

XXXVII. Irregularity.

—**Preliminary exception—Prohibition.**]—The pretension that the writ of prohibition issued to defendant is irregular, and addressed to a person non-existent, is ground of preliminary exception, which must be urged by motion, and cannot form the ground of a plea to the merits. *Lussier* v. *Corporation of Maisonneuve*, 15 Que. S.C. 45.

—**Costs—Condition of filing plea—Plea filed without payment—Acquiescence.**]—Where certain costs were ordered to be paid by defendant as a condition of his filing a plea, but the plea was, in fact, filed without payment of said costs, the plaintiff by not excepting to the regularity of the filing of the plea, but, on the contrary, answering the same, acquiesced in the filing thereof; and it was too late, a month afterwards, to question the regularity of the filing of the plea by moving for its rejection. *McGreevy* v. *Lapalme*, 15 Que. S.C. 61.

—**Report of experts—Oath—Certificate—Signature of official administering oath.**]—When it is proved that experts have been sworn, the Court will not reject their report on the ground that the official who administered the oath signed his initials instead of his name, and placed those initials at the head of the page containing the oath instead of at the foot of his certificate. *Prévost* v. *Holland*, 15 Que. S.C. 298.

—**Requête civile—Contempt of Court—Motion for rule—Subsequent objection of want of service—Art. 176 C.C.P.**]—A party who applies for a rule for attachment for contempt arising out of allegations in a *requête civile* cannot, after dismissal of his motion, be heard to object that a copy of the *requête* was never served on him, the delays prescribed for service by Art. 176 C.C.P. having expired. *Duff* v. *Palliser*, 2 Que. P.R. 237.

XXXVIII. Judgments.

—A judgment recovered against one or more of partners or other joint debtors under Consolidated Rules 587, 603, and 605, does not prevent the plaintiff from proceeding in the same action to judgment against the other defendants. *McLeod* v. *Power*, [1898] 2 Ch. 295 distinguished. *Dueber* v. *Taggart*, 26 Ont. App. 295.

—**Judgment—Specific performance and damages—Interlocutory judgment—Subsequent delivery of statement of claim.**]—The writ of summons was indorsed with a claim for specific performance of an agreement "and for damages for breach of the said agreement." The defendant not appearing, interlocutory judgment was signed against him on the 16th April, 1898, for damages to be assessed. On the 12th May following, a statement of claim was delivered, and on the 16th May the damages were assessed by a Judge of the High Court at a sittings for the trial of actions.—Held, that the interlocutory judgment was irregular; the plaintiffs, upon default of appearance, should have delivered a statement of claim, and, if no defence delivered, proceeded to judgment by motion. —Held, also, that the plaintiffs had no right to treat the statement of claim delivered by them as nugatory, and proceed to assessment of damages on the writ of summons as forming the record: *Semble*, that the plaintiffs could properly claim specific performance, and, in the alternative, damages for breach of the agreement. *Stuart* v. *McVicar*, 18 Ont. Pr. 250.

—**Ont. Rule 603—Defence—Validity—Information and Belief—Married woman—Separate estate—Foreign law.**]—In an action upon a promissory note made in the State of New York, the defendants, who were husband and wife, in answer to an application for summary judgment under Rule 603, swore that the note was given upon a certain condition which had not been fulfilled by the payees; that the defendants were informed and believed that the plaintiffs, the indorsees of the note, were suing for the benefit of the payees, and were not holders for value, or took it after maturity. The source of the information was not given, and the plaintiffs positively denied that there was any notice of any condition. There was no proof that the wife had separate estate in Ontario, but the plaintiffs filed an affidavit made by a counsellor-at-law in the State of New York, who stated that by the law there in force it was not necessary that a married woman should be possessed of any property, either real or personal, to enable her to contract or to make her contracts binding in law, her right to contract being the same as if she were unmarried. This affidavit was not contradicted:—Held, that no valid defence was shewn, and the plaintiffs were entitled to summary judgment against both defendants: *Bank of Toronto* v. *Kelly*, 17 Ont. Pr. 250, followed; *Munro* v. *Orr*, 17 Ont. Pr. 53, distinguished. *Jones* v. *Mason*, 18 Ont. Pr. 442.

—**Setting aside—Procedure—Petition.**]—In this action the plaintiff alleged a wrongful interference with his property under a judgment obtained against him by the defendant by fraud in a former action in the High Court of Justice for Ontario, and his claim was to have the judgment set aside and to recover damages for the wrong. Rule 642 provides that a party entitled to impeach a judgment on the ground of fraud shall proceed by petition in the cause:—Held, that the provisions of the Rule were not applicable to this case, and were only applicable and imperative, if imperative at all, in a simple case

where no consequential relief is sought, or, if sought, where it may be granted upon the petition in the original action. *Leeming* v. *Armitage*, 18 Ont. Pr. 486.

—Saisie-arrêt — Condemnation of tiers-saisi — Appeal—Intervention.]—When judgment has been given condemning the *tiers-saisi* to pay the seizing creditor (*saisissant*) there is nothing more for the subsequent seizing creditors to do.—The latter, if they wish an appeal to the creditors and a division of the seizable portion of defendant's salary should intervene in the action of the first seizing creditor before judgment therein and demand the insolvency (*déconfiture*) of their common debtor. *Pampalon* v. *Lortié*, 15 Que. S.C. 337.

—Opposition to judgment—Dismissal—Delays—Right to requête civile after.]—The filing of an opposition to a judgment obtained ex parte which opposition was dismissed as being beyond the time fixed by Art. 1166 C.C.P. is not a bar to proceeding against the judgment by way of *requête civile* if the defendant is still within the delays fixed for such proceeding. *Cautin* v. *Braham*, 15 Que. S.C. 454.

—Right of party to compel entry of a judgment pronounced against him.]—Drake, J. (Irving, J., concurring), affirming Bole, L.J.S.C., refused to compel the plaintiff, or permit the defendant, to perfect and enter the order for judgment for the plaintiff pronounced at the trial. *Lang* v. *City of Victoria*, 6 B.C.R. 104.

—Entering — Time — Appeal—Appeal from an order before it is entered.]—A judgment is appealable from the moment that it is pronounced, and an objection to the hearing of an appeal, otherwise regular, that the judgment appealed from had not been entered, was overruled. *Lang* v. *City of Victoria*, 6 B.C.R. 117.

—Dismissal of application for judgment—Time for putting in defence.]—The dismissal of an application for leave to sign judgment under Order XIV., is equivalent to giving leave to defend, and the defendant has therefore eight days in which to deliver his defence unless otherwise ordered. *Pounder* v. *Corner*, 6 B.C.R. 177.

—Special Indorsement—Nullity—Abandonment of action—Joint contractors—Release—Costs—Amendment—Execution.]—The writ of summons was indorsed with a claim for $404 for services rendered and money expended for the defendants, indicating the nature of the services and of the expenditure, but not the items:—Held, not a special indorsement, and that there was no right to sign final judgments thereon for non-appearance of certain of the defendants, and the judgments which the plaintiff purported to sign were nullities, and the plaintiff, by proceeding against the other defendants without taking any warranted proceedings against the defendants who did not appear, must be taken to have abandoned his action against them. The cause of action was a joint one against thirty-one defendants. Twelve of them did not appear, and judgments were signed against these for the full amount claimed. The other nineteen appeared, and as against them the action proceeded to trial, and judgment was given for the plaintiff against these defendants for $116. An appeal by these nineteen defendants was allowed as to eleven of them, but dismissed as to eight. After this the plaintiff made an agreement with the twelve defendants against whom judgments had been signed for default, that upon each defendant paying to the plaintiff the sum of $10, such defendant should be released from all liability in respect of the plaintiff's cause of action against him:—Held, that, as the release occurred after judgment against the defendants who had appeared, it could not be pleaded in the action; but, as the action was for a joint liability of the defendants who did not appear and of those who failed in appeal, and the plaintiff never had any claim against these defendants for any sum but $116, and the plaintiff had been paid by or had agreed to accept from the defendants who failed to appear a larger sum, $120, it would be inequitable that the plaintiff should be permitted to enforce his judgment against the defendants who failed in appeal:—Held, also, that the plaintiff, after the judgment in appeal, should have amended the judgment below in accordance with the certificate of the Court of Appeal, and that the costs in the Court of Appeal should have been added to the costs of the action, and only one execution issued thereon. *Hoffman* v. *Crerar*, 18 Ont. Pr. 473.

—Default judgment—Defective special indorsement.]—Where a statement of claim is required, if no other statement of claim is delivered, there must be a good special indorsement under Rule 15 (B.C.) to sustain a default judgment under Rule 242. *Hassard* v. *Riley*, 6 B.C.R. 167.

And see JUDGMENT.

XXXIX. JURY AND JURY NOTICE.

—Failure to agree—Right of Judge to dismiss action.]—Rule 780 which provides that "if the jury disagree and find no verdict, the Judge at, or after the trial, may, notwithstanding, dismiss the action" does not empower the Judge in every case of disagreement to determine the action himself; it is confined to the case where he is of the opinion that he should have withdrawn it from the jury. *Floer* v. *Michigan Central Ry. Co.*, 30 Ont. R. 635.

—Trial by jury—Delays—Art. 442 C.C.P.]—Under the new Code of Procedure a party demanding a trial by jury is barred from so proceeding on the expiration of thirty days

following that on which the cause is ready for trial.—But the opposite party has fifteen days longer to avail himself of his adversary's demand (Art. 442 C.C.P.). If he does not wish to do so he can *de plein droit* inscribe for proof and hearing as soon as his adversary is foreclosed by the expiration of said delay of thirty days.—The cause is ready for trial by jury as soon as the parties are at issue, and the proper party may then take the necessary steps for this mode of proceeding, the first of which is the assignment of facts or the consent of the parties to dispense with them. *Goulet* v. *Landry*, 15 Que. S.C. 569.

—Jury trial—Personal torts—Art. 421 C.C.P.]—The proprietors of a private hospital sued the City of Montreal claiming damages for refusal by the city to cause to be transferred to the city hospital a patient of the plaintiffs' institution suffering from smallpox (*variole*), in the sum of $6,500 of which $1,000 was for injury to the health of the plaintiffs and $5,500 for injury to their business:—Held, that though the claim of $1,000 was for a personal tort the rest of the demand was not of that character, and did not result from any *délits* or *quasi-délits* against movable property; therefore, the plaintiffs' action could not be brought before a jury. *McCuaig* v. *City of Montreal*, 14 Que. S.C. 175.

—Trial by jury—Amount required—Amount demanded—Abandonment.]—It is the amount demanded by the action which should be looked at to determine whether or not there should be a jury trial, and not the amount to which the demand may be afterwards reduced by a partial abandonment by the plaintiff. *Paradis* v. *Thibaudeau*, 8 Que. Q.B. 243.

—Jury trial—Personal wrongs—Arts. 421, 833 C.C.P.—Arts. 1056, 2262 C.C.]—An action by a wife for damages resulting from the death of her husband, is one for personal wrong, and can be tried by jury. *Bouissede* v. *Hamilton*, 2 Que. P.R. 135.

—Criminal cause—Riot at former trial—Affidavit of jurors as to fact tending to influence them—Change of venue.]

See CRIMINAL LAW, XVI.

XL. MOTIONS.

—Erasures and interlineations—Law stamp—Peremption d'instance—Art. 1176 R.S.Q.]—The respondent had made a motion for *peremption d'instance*. The notice appeared to have been originally given for "Monday, the Twenty-first September, instant," but the word "Monday" had subsequently been erased and the word "Thursday" written above it. "Fourth" had been written above the word "first" but the latter was not erased. Moreover, the law stamp required for the presentation of the motion had only been cancelled the day before the judgment on this motion:—Held, that the erasure and interlineations on the notice constituted an irregularity of which the appellant could take advantage, and for want of the proper stamp the motion should not have been received. Art. 1176 R.S.Q. *Thomas* v. *Workman*, 8 Que. Q.B. 142.

—Allegation—Rejection—Proper procedure.]—An allegation can only be rejected on motion when it is irregular in form; when it does not justify the conclusion of the party its rejection should be demanded by *inscription en droit*. *O'Dell* v. *Bell*, 14 Que. S.C. 482.

—Motion for particulars—Stamps—Art. 165 C.C.P.]—A motion for particulars need not have the stamps required for a preliminary pleading nor be accompanied by the deposit mentioned in Art. 165 C.C.P. *Menier* v. *Divers*, 2 Que. P.R. 38.

—Particulars—Amendment—Stamps—Deposit.]—A motion for particulars, and a motion to reject an amendment, should each be stamped as preliminary pleadings and accompanied by the deposit required by the rules of practice. *Galbraith* v. *Cowan*, 2 Que. P.R. 67.

—Pending motion—Péremption d'instance.]—If a motion for *péremption d'instance* has been made in a cause but not presented nor dismissed for want of prosecution, a second motion for *péremption* will not be entertained until the first has been disposed of. *Boisseau* v. *Généreux*, 2 Que. P.R. 89.

—Security for costs—Affidavit—Delay—Art. 164 C.C.P.]—When it does not appear in the writ itself that the plaintiff resides out of the jurisdiction, but the fact first appears in the motion for security for costs, such motion should be accompanied by an affidavit. Such motion must be presented as soon as possible after expiration of the delay accorded to the opposite party. A deposit is not required with such a motion. *Laigre* v. *Cordallaz*, 2 Que. P.R. 182.

—Motion for security for costs—When to be made.]—A motion for security for costs and power of attorney may be made after a motion of the nature of an exception to the form, based upon the fact that the domicile of one of the plaintiffs is not stated, so long as both motions are made within the delay required for preliminary exceptions, and presented at the same time. *Taylor* v. *Lewis*, 2 Que. P.R. 187.

—Injunction—Motion for attachment—Affidavit—Form of motion—Art. 108 C.C.P.]—A motion for a rule against parties who have not obeyed a writ of injunction should be accompanied by an affidavit but time will be given the mover for production of such affidavit on payment of the costs of the motion. The paragraphs of a motion should be consecutively numbered but permission will be given to number them at the hearing. *Montreal Park and Island Ry. Co.* v. *Town of St. Louis*, 2 Que. P.R. 213.

—Motion for péremption—Designation of attorney.]—A motion for *péremption d'instance* will not be refused because the firm name of the attorney of the plaintiff is not given at length if it is shewn that the attorney appears to have authorized the abbreviated designation, and if no prejudice is suffered. *Coulson* v. *Walters*, 2 Que. P.R. 225.

XLI. New Trial.

—Action for negligence—Excessive damage—New trial.]—The Court, thinking that the damages awarded by the jury in an action for causing death were excessive, ordered that there should be a new trial, unless the plaintiffs accepted a reduced amount. *Curran* v. *Grand Trunk Ry. Co.*, 25 Ont. App. 407.

—Criminal law—Comment by Judge on prisoner not testifying—Recalling jury—Withdrawal of comment—New trial.]

See Criminal Law, XVI.

—Libel—Publication—Evidence of motive tendered and refused—New trial.]

See Libel and Slander, V.

—Principal and surety—Judgment against principal—Proof required against surety and third party.]—See Principal and Surety, III.

—Trespass—Conventional line—Evidence—Case proper to be withdrawn from jury—New trial.]

See Trespass to Land.

XLII. Notice.

—Temporary seizure before judgment—Notice of sale—Amount of levy—Art. 640 C.C.P.]

See Execution, III.

—Originating notice—Ont. Rule 938—Gift by will—Mistake in name of donee.]

See Will, III.

XLIII. Opposition.

— Absence of parties — Dismissal — Requête civile.]—When an opposition is dismissed because the *opposant* is neither present in person nor represented by attorney the *opposant* is in the same position as a plaintiff to an action who is not ready to proceed and is nonsuited (*action renvoyée sauf à se pourvoir*.—The *opposant* in such case can resort to a new opposition but cannot proceed by a *requête civile* against the judgment dismissing his opposition. *Vezina* v. *Dastons*, 14 Que. S.C. 465.

—Opposition à fin de conserver—Judicial sale—Privileged creditor—Arts. 670, 672, 673 C.C.P.]—A plaintiff in an action claiming to be a privileged creditor as to the proceeds of a judicial sale is not thereby entitled to demand the dismissal of an *opposition à fin de conserver* regularly filed. *Lovell* v. *Collins*, 2 Que. P.R. 19.

—Opposition à fin d'annuler — Distraction of costs—Inscription in law—Art. 555 C.C.P.]—An inscription in law to a paragraph of an opposition stating that the costs of a judgment whereof execution is sought were *distraits* to the attorneys of the plaintiff, who are not the attorneys prosecuting the execution, will be dismissed. *Chisholm* v. *Wilson*, 2 Que. P.R. 96.

—Contestation of opposition—Inscription in law—Arts. 192 and 200 C.C.P.]—Matters of law must be urged by way of inscription in law, and the contestation of an opposition urging them otherwise will be dismissed on motion. —*Semble*:—A contestation denying the opposant's alleged privilege, and declaring the conclusions thereof illegal, and setting forth that the said opposition is made too late, must be considered as setting up grounds of law. *Royal Electric Co.* v. *Palliser*, 2 Que. P.R. 100.

—Seizure against husband—Opposition by wife separée de biens — Marriage contract.]—A seizure having been made on a judgment against a husband, the wife separated as to property made opposition thereto, claiming the effects seized to be her property, acquired as follows: 1. A part before her marriage; 2. A part as gifts, either at her marriage or since; and 3. A part from her husband in pursuance of a donation to her by her marriage contract and followed by peaceable possession on her part:—Held, that this opposition was not frivolous on its face and should not be dismissed on motion. *Demers* v. *Baird*, 2 Que. P.R. 121.

—Opposition à fin d'annuler—Irregularities of seizure—Damages—Arts. 76, 82, 117 C.C.P.]—A defendant, who opposes a seizure on the ground that it was illegally made, cannot, by his opposition, claim damages against the seizing party on account of such irregularities, and that part of his opposition will be dismissed on motion. *Baynes* v. *Honan*, 2 Que. P.R. 186.

—Notice of sale—Irregularity—Motion—Arts. 638, 639, 651 C.C.P.]—An opposition based on the fact that a sale under execution has been announced to take place at Montreal, the domicile of defendant, who in fact resides at Westmount, should be regularly contested, and will not be dismissed on motion. *Burke* v. *Honan*, 2 Que. P.R. 252.

—Examination of opposant—Grounds of motion—Arts. 286, 657 C.C.P.]—An examination of an *opposant* will not be allowed, before the opposition has been contested, if the motion for leave to examine does not allege that the opposition is futile and demand its dismissal. *Bouchard* v. *Ouellette*, 2 Que. P.R. 253.

XLIV. Orders.

—Inscription for proof and hearing—Peremptory list—Notice—Requête civile—Arts. 234, 235, 505, C.C.P. (old text)—Rules of Practice (S.C.) LV.]

—Under a local practice prevailing in the Superior Court, in the District of Montreal, the plaintiffs 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 defendants. The defendants did not appear when the case was taken up for proof and hearing and judgment by default was entered in favour of the plaintiffs. The defendant filed a *requête civile* asking for the revocation of the judgment, to which the plaintiffs demurred. On appeal to the Supreme Court of Canada against the judgment maintaining the demurrer and dismissing the *requête* with costs:—Held, 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, and the defendant was entitled to have the judgment revoked upon *requête civile*. *Eastern Townships Bank* v. *Swan*, 29 S.C.R. 193.

—Order affecting another cause—Notice.]—The plaintiff in an action cannot obtain an order therein affecting another cause and introduce a new judgment into the latter, at all events without giving notice to the prior seizing creditors and putting them *en demeure* to shew cause. *Pampalon* v. *Lortié*, 15 Que. S.C. 337.

—Conditional order—Return of writ—Motion to annul—Arts. 151, 154, C.C.P.]—If permission to return a writ more than three days after it should have been returned, was granted, subject to any objection that might legally be made afiainst such return, a motion by the defendant for the annulment of such return may be granted with costs. *Wilson* v. *Ryan*, 2 Que. P.R. 205.

—Supreme Court of British Columbia—Local Judge's order—Ultra vires—Nullity.]—An order issued by, and purporting to be an order of, the Supreme Court (although made *ultra vires*) is not a nullity, but is valid until set aside by the Court. *Brigman* v. *McKenzie*, 6 B.C.R. 56.

—Motion to vary order—Real decision.]—Three solicitors representing different interests were present in Chambers when a consent order was pronounced. One of the three, on a subsequent day, moved to vary the order as issued so as to make it conform to the Judge's decision as to costs. The amendment suggested did not affect the interest of one of the two other parties, but did affect that of the third, by whom the order had been taken out. No two of the solicitors agreed as to the decision, and the presiding Judge did not remember what it was:—Held, that, under these circumstances, the order as issued must stand, and the application be dismissed. [McDonald, C.J. (N.S.) in Chambers]. *Cross* v. *Heisler*, 19 C.L.T. (Occ. N.) 114.

—Order granted nunc pro tunc in criminal proceeding—Validity.]—See CRIMINAL LAW, XVI.

—Trustees—Vesting order.]

See TRUSTS AND TRUSTEES, IX.

XLV. PARTICULARS.

—Demand for particulars—Deposit—Art. 165 C.C.P.]—A motion for an order for particulars need not be accompanied by the deposit mentioned in Art. 165 C.C.P. *Gingras* v. *Boulanger*, 15 Que. S.C. 60.

—Privilege of builder—Demand for statement—Incompatibility with personal demand.]—A demand for a statement of the privilege of a builder, under Art. 2013 C.C., is not incompatible with a personal demand against all those who are under obligation to pay the debt for which the privilege exists. *Banque Jacques-Cartier* v. *Picard*, 15 Que. S.C. 389.

—Municipal election—Contestation—Petition.]—A petition contesting a municipal election will not be dismissed merely because the particular facts on which the petitioner intends to rely are not set out in detail, but if the defendant demands these particulars, the petitioner must supply them. *Germain* v. *Hurteau*, 15 Que. S.C. 614.

—Confession of judgment as to part of claim.]—The defendant who has filed a partial confession of judgment can be compelled to furnish particulars indicating the items of plaintiff's account which are covered by such confession. *Lafortune* v. *Town of Joliette*, 2 Que. P.R. 24.

—Slander—Action for damages—Particulars of places and dates—Witnesses.]—In an action for damages for slander, the plaintiff set out certain places where the defamatory words had been spoken, and alleged that the same accusations had been repeated in divers other places to several persons, between certain dates. On a motion for particulars.—Held, that plaintiff was obliged to specify the places where, and the dates on which, the words in question had been repeated, but he could not be compelled to disclose in advance the names of the persons in whose presence the accusations had been made, which would be compelling him to disclose the identity of his witnesses, and that could not be done in an action for damages any more than in any other kind of action. *Roy* v. *Powell*, 2 Que. P.R. 27.

—Defamation—Traders—Particulars of time, place and persons.]—In an action between traders claiming damages for slander the defendant has a right to know the names of the persons to whom he is accused of having spoken the defamatory words charged, that he may either plead privilege or explain, deny or withdraw them or tender indemnity, and to know when these words were spoken; the plaintiff must furnish these particulars on pain of dismissal of his action. *Coallier* v. *Filiatrault*, 2 Que. P.R. 33.

—**Motion for particulars — Stamps — Art. 165 C.C.P.**]—It is not necessary for a motion for particulars to be stamped as required in a preliminary pleading or accompanied by the deposit mentioned in Art. 165 C.C.P. *Menier* v. *Divers*, 2 Que. P.R. 38.

—**Costs of motion.**]—As a general rule the costs of a motion for particulars should follow the issue of the action. *Luneau* v. *Juneau*, 2 Que. P.R. 74.

—**Allegation of acknowledgment of debt sued for.**]—A party may be obliged to furnish particulars of a part of an allegation stating "which amount said company defendant has often acknowledged to owe and promised to pay plaintiff" by stating the manner in which such acknowledgment was made, whether it was in writing or by resolution of the directors, and also the date on which it was made. *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*, 2 Que. P.R. 89.

—**Work and labour—Motion for particulars—Preliminary exception.**]—A plaintiff who claims by his action a sum of money as "the price and value of work done, services rendered and disbursements made by plaintiff in his capacity of promoter" will be obliged, on motion therefor, to indicate what work was done, what services rendered, what sums disbursed and the dates and places of each.—This motion is not a preliminary exception and is not subject to the formalities of deposit and supplementary stamps. *Bartlett* v. *Elliott*, 2 Que. P.R. 97.

—**Negligence—Action for damages—Other accidents.**]—In an action claiming damages for injury by accident the plaintiff, in answer to the pleas, may allege that numerous accidents have occurred in the same locality without being obliged to give the particulars of these accidents. *Conturier* v. *Royal Electric Co.*, 2 Que. P.R. 137.

—**Motion—Costs—Arts. 23 and 28 of tariff.**]—A motion for particulars is not a preliminary exception and should be taxed as a common motion even if accompanied by a deposit by the party presenting it without success. *Larivé* v. *St. Jacques*, 2 Que. P.R. 160.

—**Motion—Exception to the form—Deposit—Art. 165 C.C.P.**]—When the motion for particulars does not amount to an exception to the form, no deposit is required with it. *Oldall* v. *Taylor*, 2 Que. P.R. 288.

—**Action for conversion of chattel—Title.**]—In an action for the conversion of a portable mill, the plaintiff sued as administrator of the estate of the former owner. The statement of claim alleged that the intestate being owner of the mill, the defendant wrongfully converted it, etc. The defendant moved for particulars of the plaintiff's title to the mill:—Held, that in an action for the recovery of personal property, such particulars would be merely anticipation of the reply. The rule as to pleading title when out of possession and claiming real property cannot be extended to cover personal property. Motion dismissed with costs. [McDonald, C.J. (N.S.), in Chambers.] *Collishaw* v. *Acadia Pulp Co.*, 19 C.L.T. (Occ. N.) 115.

—**Motion—Stamps—Deposit.**]

See hereunder, XL.

XLVI. Péremption.

—**Motion—Want of appearance—Art. 161 C.C.P.**]—If he has taken no other proceedings on an opposition during the time fixed by law for the *péremption* the plaintiff may make a motion for *péremption d'instance* without a previous appearance by his attorney. *Mercier* v. *Roy*, 2 Que. P.R. 174.

—**Death of parties—Representatives—Art. 269 C.C.P.**]—Judgment will not be given on a motion for *péremption d'instance*, taken *en délibéré* after the filing of a suggestion of the death of plaintiff, before the parties in interest have taken up the *instance* or been brought into the cause. *Macadam* v. *Thompson*, 2 Que. P.R. 216.

—**Motion—Signature of attorney.**]—A motion for *péremption d'instance* will be dismissed, if signed by an attorney other than the one on the record. *Allen* v. *Monday*, 2 Que. P.R. 235.

XLVII. Proceedings after Settlement.

—**Settlement between parties—Costs of attorneys—Inscriptions.**]—A case cannot be inscribed for *enquête* and merits after the parties have settled it, even if the said settlement makes no mention of costs.—*Quære*, Can the attorney then proceed for his costs? *Delaney* v. *Lionais*, 2 Que. P.R. 215.

XLVIII. Procedure in Particular Matters.

—**Action en reddition de compte—Account rendered—Exception à la forme—Art. 522 C.C.P. (old text)—Art. 567 C.C.P.—Construction of word.**]—An exception to the form will not be allowed to an account rendered in an action *en reddition de compte*. If the account is incomplete or irregular, the party requiring it may demand its rejection, or that the person liable to furnish it (*le rendant-compte*) should furnish the details which are lacking. *Evans* v. *Wilson*, 8 Que. Q.B. 144.

—**Reddition de compte—Action for—Right of defendant.**]—A defendant, sued *en reddition de compte*, may at once file his account without waiting for the judgment condemning him to render it, without prejudice to the plaintiff's right to discuss such account after the Court has pronounced upon its sufficiency. *Howes* v. *Coristine*, 14 Que. S.C. 231.

—Petition for interlocutory injunction—Service on opposite party—Summons.]—Where an interlocutory injunction is sought to be issued at the same time as the writ of summons in a cause, it must be asked for by petition, and such petition must be notified to the opposite party and adjudicated upon before the issue and service of the writ of summons in the cause; and where the interlocutory injunction is granted it must be served at the same time as the writ of summons. The defendant is without right to complain that he was not summoned to answer the petition by means of a writ of summons. *Hart* v. *Rainville*, 15 Que. S.C. 17.

—Mandamus—Transfer of shares in company—Compelling entry.]—A writ of mandamus to compel the entry in the books of a company of a transfer of shares should be directed against the company itself and not against the directors. *Upton* v. *Hutcheson*, 15 Que. S.C. 396.

—Interlocutory judgment—Abandonment—Signature—Validity.]—The abandonment of an interlocutory judgment, to be valid, should be signed by the party himself or by his attorney specially authorized for the purpose. *Foisy* v. *Plamondon*, 15 Que. S.C. 425.

—Action by physician or surgeon—Allegation of registry—Defence for want of—Exception à la forme—Inscription en droit.]—Art. 3994 R.S.Q. which provides that no physician or surgeon has a right to recover on an account before a Court for medical or surgical advice, professional services, operations or remedies that he has prescribed or given, unless it is proved that he is registered according to law, and has paid his annual fee to the College of Physicians and Surgeons of the Province of Quebec, creates an incapacity, and therefore the fact that a physician suing for professional services has not alleged that he is registered according to law and has paid his fee should be opposed by an exception to the form and not by *inscription en droit*. *Marieu* v. *Huot*, 15 Que. S.C. 455.

—Sale of land subject to usufruct—Procedure to contest a report of distribution—Inscription.]—Contestation of a report of distribution is of the nature of a demurrer, and practically a revision of the prothonotary's report, and should be inscribed only for hearing, proof of any kind being inadmissible other than that which the record contained, when the report was drafted. *Township of Ascot* v. *Early*, 5 Rev. de Jur. 7.

XLIX. Qui tam Action.

—Prohibition Plebiscite Act. 1898—Action for penalties—Affidavit—R.S.Q. Arts. 5717, 5719.]—The words "any act" in Art. 5719 of the Revised Statutes of Quebec, mean any act of the provincial legislature. Therefore the exception contained in that article does not apply to the Dominion Prohibition Plebiscite Act, 1898, and an affidavit was necessary, under Art. 5716 of the Revised Statutes of Quebec, before the issue of a writ in an action for a penalty under the said Plebiscite Act. *Timmis* v. *Lewis*, 15 Que. S.C. 233.

—Security for costs—Motion—Deposit—Arts. 165, 177, 180, 181 C.C.P.]—A motion for security for costs in a *qui tam* action will be dismissed if it is not accompanied by a deposit and stamped as a preliminary pleading. *Rogerson* v. *Ogilay*, 2 Que. P.R. 95.

—License Act—Action for penalties.]—An action by a Municipal Corporation for penalties for contravention of the License Act is a *qui tam* action and should be brought as well in the name of Her Majesty as in that of the corporation. *Corporation of St. Raphael* v. *Tanguay*, 2 Que. P.R. 224.

L. Quo Warranto.

—School commissioner—Contesting election—Form of objection—Arts. 987 C.C.P.—Art. 2015 R.S.Q.]—The objections against a writ of *quo warranto* against a commissioner of schools, that the application was presented too late, not precise enough, not properly served, that applicant had not given the security required by law, should be met by an exception to the form, and want of jurisdiction in the Court to take cognizance of the application should be raised by *exception déclinatorie*. *Joyce* v. *Hart*, 14 S.C. 199, affirmed on the merits by Court of Review, 28 June, 1898.

—Petition—Description of petitioner—Exception to the form.]—In a petition for a writ of *quo warranto*, the fact that the petitioner is described in the petition and affidavit under the name of "Louis Péloquin" while the affidavit is signed "Luis Poliquin" is sufficient ground for exception to the form.—*Semble:*—A motion to amend such description in the petition and affidavit, accompanied by an affidavit stating that this is simply a clerical error, would be granted. *Poliquin* v. *Martel*, 2 Que. P.R. 60.

—Information—Affidavit—Person administering oath—Competency—Exception to the form—Acts. 980, 988 C.C.P.]—See hereunder, V.

LI. Replevin.

—Replevin bond—Requirements as to sureties—Ship whether repleviable—C.S.B.C. 1888, c. 101.]—Per Drake, J.: It is not necessary under the Replevin Act, C.S.B.C. 1888, c. 101, that the sureties on a replevin bond should be worth the amount of the bond, or that there should be sureties at all, but only that there shall be a bond in double the value, etc., to the satisfaction of the sheriff.—A ship is repleviable. *Dunsmuir* v. *Klondike & Columbian Gold Fields Co.*, 6 B.C.R. 200.

—Replevin—R.S.B.C. c. 165.]—The Court procedure and practice existing under the old Replevin Act are still in force, although the

new Act contains no reference to pleading or practice other than to authorize their being dealt with by Rules of Court to be made. *McGregor* v. *McGregor*, 6 B.C.R. 258.

And see REPLEVIN.

LII. RULES.

—Civil imprisonment—Rule nisi—Personal service—Liquidation—Art. 837 C.C.P.]—Personal service of a motion for the issue of a rule *nisi* is not necessary, provided the rule itself be served personally.—When a judgment has ordered a liquidator to pay immediately a certain sum, and has ordered his imprisonment in default of obedience to said judgment, the liquidator cannot plead to a rule *nisi* that he cannot be forced to make such payment until the liquidation of the insolvent estate is complete. *Queen's Hotel Co.* v. *Radford*, 2 Que. P.R. 113.

LIII. SERVICE OF PROCESS.

— Jurisdiction—Railway company—Negligence in another province—Service of writ.]—In an action brought in Ontario against the Canadian Pacific Railway Co. by the personal representative, appointed in Ontario, of a person killed in British Columbia through the negligence there of servants of the company the writ may be served on the defendants in Ontario, in accordance with the provisions of Consolidated Rules 159 and 160. *Tytler* v. *Canadian Pacific Ry. Co.*, 26 Ont. App. 467.

—Service on foreign corporation—Business within Ontario—Agent.]—A writ of summons may be served in Ontario upon a foreign corporation in a case where service out of Ontario is not authorized by the rules; but in such a case it must appear that the corporation are carrying on business in Ontario in such manner as to render them subject to be deemed resident within Ontario; and the words of Rule 159, "a person who transacts or carries on any of the business of, or any business for, any corporation," mean, at the least, some person who is an agent of the corporation, who transacts or carries on here, or controls or manages for them here, some part of the business which the corporation profess to do and for which they were incorporated. And in this case the defendants were not, at the time of service of the writ, carrying on any of their business in this province in such a manner as to warrant a finding that they were then resident here; nor was the person served with the writ such a person as is described in the part of the rule quoted. *Murphy* v. *Phœnix Bridge Co.*, 18 Ont. Pr. 495, reversing 18 Ont. Pr. 406.

—Assignation—Exception à la forme—Permission to serve at attorney's office—Arts. 136, 145, 526 C.C.P.]—Arts. 136, 145 and 526 of the Code of Civil Procedure authorize a Judge, when the defendant who has been served as domiciled at Montreal pleads by exception to the form that his domicile is in New York, to permit the plaintiff to serve the writ on defendant at the office of his attorney, the defendant having shewn by his *exception à la forme* that he had knowledge of the action. *Gourlay* v. *Conway*, 15 Que S.C. 41.

—Amendment of declaration—Service of—Art. 526 C.C.P.]—In a case where the law permits the declaration to be served separately from the writ, and it has been so served, and subsequently an amendment to the declaration is allowed, the declaration may, after amendment, by leave of the Judge, and upon such conditions as he may fix, be served *de novo*, and be dated on the day of making the amendment, without new service of the writ being necessary. *Hamilton* v. *Bovril Co.*, 15 Que. S.C. 62.

— Contrainte par corps — Service — Art. 837 C.C.P.]—The provision contained in Art. 837 C.C.P., requiring personal notice to the party liable, of an application for a rule for coercive imprisonment, is imperative, and where the service has not been personal, the defect is fatal, and is not cured even by the appearance of the party by attorney, and his failure at the time to invoke the defect of service. *Lamothe* v. *Lamothe*, 15 Que. S.C. 342.

—Controverted election—Preliminary objection—Service of notice—Copy—Disability of officers.]—However irregular it may be to serve a party entitled to notice with a mere copy, such service is valid, being sufficient to inform the party of that of which he should be notified. — Though the law requires the service of an election petition to be made by the sheriff or a bailiff, the deputy-sheriff has a right to serve it, having for such purpose the same powers as the sheriff himself.—The disabilities which prevent officers from acting in causes or proceedings in which their relations by blood or affinity are interested, do not affect the deputy more than the sheriff himself. *Dubreuil* v. *Delaney*, 15 Que. S.C. 525.

—Amendment—Service—Delay—Art. 523 C.C.P.]—Where the judgment allowing an amendment does not fix the delay within which it shall be served, the Court cannot authorize service after the expiration of three days from the date of the order. *Lemieux* v. *Lemieux*, 2 Que. P.R. 25.

—Rule nisi—Personal service.]—Personal service of a motion for the issue of a rule *nisi* is not necessary provided the rule itself be served personally. *Queen's Hotel Co.* v. *Radford*, 2 Que. P.R. 113.

—Action against company—Agent—Arts. 140, 142 C.C.P.]—When an action is brought against an incorporated company, service on an agent who takes orders and forwards them to the company who ships the goods directly to the purchasers, such agent being

paid by commission, is irregular. *Macdougall* v. *Schofield Woollen Co.*, 2 Que. P.R. 233.

—Opposition to judgment—Signification—Arts. 1170, 1171, 1172 C.C.P.]—An opposition to a judgment, a copy of which has not been served on the parties to the cause, or on their attorneys, if made within a year and a day from the judgment, is radically void and will be dismissed on motion. *Banque de St. Jean* v. *United Counties Ry. Co.*, 2 Que. P.R. 246.

—Service on agent—Mandat—Art. 136 C.C.P.]—Service of an action at the residence or place of business of an agent or mandataire of the defendant is void, even if by correspondence the defendant has referred plaintiff to the agent for payment of his debt. For such service to be valid the defendant must have given his agent a special mandate for the purpose. *Longpré* v. *Perkins*, 2 Que. P.R. 307.

—Service out of jurisdiction—Technical Objection where plaintiff has good cause of action—Affidavit.]—Plaintiff applied for, and obtained, an order for a writ of summons for service out of the jurisdiction, upon the defendant at Toronto. The affidavit upon which the application for the writ was made, set out that plaintiff had a good cause of action, viz., the failure of defendant to deliver, according to contract, a quantity of oats purchased from him for delivery at Truro, and other points in this province. Attached to the affidavit was certain correspondence relied upon as evidence in support of the contract. Defendant denied the making of the contract, and moved to set aside the writ and service, and the order therefor. Held, that the question, being a doubtful one, must be decided upon the trial and not by affidavit. The form of the order was that C., (plaintiff), be at liberty to issue a writ for service out of the jurisdiction against G. (defendant). Held, that the order was good, and that the words used were reasonably sufficient to cover leave to issue as well as leave to serve the writ, and that the English practice by which leave to issue is embodied in one paragraph of the order, and leave to serve in another is not binding in this province. Held, that it was not necessary, in the affidavit for the order, to shew that defendant was a British subject, the writ being issued for service on a defendant resident in a British possession. Held, also, that where the Court is satisfied that the plaintiff has a good cause of action, it will not set aside the writ, or the service thereof, on account of technical objections or slips by which no injury has been caused to the defendant. *Summer* v. *Cole*, 32 N.S.R. 112.

—Service of summons.]—While a summons to review a taxation of costs under an order otherwise worked out was still pending, a summons to abridge the time for setting down an appeal from the final judgment in the matter was served on the solicitor who took out the first summons:—Held, good service, nowithstanding the fact that the solicitor's engagement with the client had terminated, and that he had so informed the party effecting the service. *Arthur* v. *Nelson*, 6 B.C.R. 316.

—Application to sign judgment—Dismissal—Time for delivering defence thereafter.]

See hereunder, XXXVIII.

LIV. Special Case.

—Ont. Succession Duty Act—Forum—Special case.]—When the provincial treasurer and the parties interested do not agree as to the succession duty payable, the question must be settled by the tribunal appointed by the Act, namely, the Surrogate Registrar, with the right of appeal given by the Act. The High Court has no jurisdiction to decide the question in a stated case. The Court of Appeal refused, therefore, to entertain an appeal from the judgments of Rose, J., 27 Ont. R. 380, and 28 Ont. R. 571. Questions of law which cannot properly arise in, or as incidental to an action, or other proceeding in Court, cannot be made the subject of a special case under Rule 372 in order to obtain the opinion of the Court thereon. *Attorney-General* v. *Cameron*, 26 Ont. App. 103.

LV. Statutory Offences.

—If a statute provides that proceedings for a certain offence must be instituted within a certain delay after its commission, and that one or more offences of the same nature against the same statute may be inserted in the same proceeding, then a charge laid at a date established for one offence is presumed to comprise all offences against said statute up to the date of the charge. *Mathieu* v. *Wentworth*, 15 Que. S.C. 504.

LVI. Stay of Proceedings.

—Judgment of third party against plaintiff in action—Saisie-arrêt on—Dilatory exception—Art. 177 C.C.P.]—The holder of a judgment against the plaintiff in an action issued a *saisie-arrêt* after judgment in the hands of defendant, who then, by dilatory exception, asked that proceedings in the action be stayed until an adjudication was had on the *saisie-arrêt:*—Held, that defendant was not entitled to said stay, the two proceedings being entirely distinct and separate. The case is not one of those provided for by Art. 177 C.C.P., and cannot, therefore, be ground for a dilatory exception. *Gagnon* v. *Lupien*, 2 Que. P.R. 39.

—Hypothec—Personal action—Surrender—Art. 177, par. 6 C.C.P.]—In a personal action for money lent the declaration cannot conclude for surrender of the immovable hypothecated to secure such loan, and the action against

the *tiers détenteur* of the immovable will be stayed until the personal action is decided. *Anderson* v. *Taillefer*, 2 Que. P.R. 78.

—Requête civile—Opposition to judgment—Arts. 1166, 1167, 1177, 1182 C.C.P.]—The order for a stay of proceedings (*sursis*) on a *requête civile* cannot be granted in a case where the judgment sought to be quashed is susceptible of *opposition à jugement*. *Mathieu* v. *Corbeil*, 2 Que. P.R. 102.

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

—Stay of proceedings in devastavit action.]

See EXECUTORS AND ADMINISTRATORS, V.

LVII. SUMMONS.

—General summons for directions—Particular summons for examination—Costs.]—Where a summons is taken out with respect to any of the matters for which under Rule 269 (*a*) a general summons for directions should have been taken, the costs will be reserved, to consider whether, in the event of any other summons being taken out, all such applications could not have conveniently been dealt with under a general summons, and the costs only of such an application allowed. *Jones* v. *Pemberton*. 6 B.C.R. 67.

—Winding-up order—Application for—Summons.]—All applications made to the Court in respect of its winding-up jurisdiction must be made by summons. *Re Nelson Sawmill Co.*, 6 B.C.R. 156.

—Judgment creditor—Saisie-Arrêt after judgment—Foreign company—Summons to come to Montreal to disclose what it owed to judgment debtor.]—See DEBTOR AND CREDITOR, IX.

LVIII. TENDER.

—Tender—Evidence of or dispensation with.]—Placing money to the credit of a solicitor in a bank, in a place where the solicitor resides and notifying him thereof, do not constitute a good tender. Silence on the part of the solicitor is not a waiver. *Dunlop* v. *Haney*, 6 B.C.R. 185.

LIX. TRIAL.

—Close of pleadings—Re-opening—Order permitting third parties to defend.]—Where a third party notice had been served by the defendant before the close of the pleadings between the plaintiffs and defendant, but the action had been set down by the plaintiffs to be tried at Toronto without a jury and notice of trial given before the plaintiffs were aware that such third party notice had been served, and before notice of motion had been given by the defendant for an order giving directions as to the trial:—Held, that the order made upon such motion, which permitted the third parties to come in and defend, and directed that the issue between the defendant and the third parties should be tried at the same time as the action, reopened the pleadings, and they were not closed (the third parties having delivered a defence) until the expiration of the time for replying to that defence. The duty of the plaintiffs then was to draw up a new record of the pleadings, including in it the defence of the third parties, enter the case again for trial, and give notice of trial to the defendant and third parties, under Rule 542. *Confederation Life Association* v. *Labatt*, 18 Ont. Pr. 238.

—Local Judge—Jurisdiction—Order ultra vires.]—Notice of trial having been given in an action in the Supreme Court for trial with a jury, and the plaintiff not appearing, judgment was given for defendants:—Held, by

the Full Court on appeal from the judgment: A local Judge of the Supreme Court has no power to sit as a trial Judge in an action. An order issued by and purporting to be an order of the Supreme Court (although made *ultra vires*) is not a nullity, but is valid until set aside by the Court. Although an appeal lies from such an order to the Full Court, the more convenient and inexpensive course is to move before a judge to rescind it, and the appeal was therefore allowed with costs as of a motion to rescind. *Brigman* v. *McKenzie*, 6 B.C.R. 56.

—Mining suit—Mode of trial—Scientific investigation.]—By B.C. Rule 331 a Judge may direct a trial without a jury of any issue, which previous to the Judicature Act could, without any consent of parties, have been tried without a jury, and by Rule 332 he may direct the trial without a jury of any issue requiring any scientific investigation which in his opinion cannot conveniently be made with a jury. In a mining suit respecting extralateral rights, the plaintiff company sued for an injunction restraining the defendant company from sinking an incline shaft in plaintiff's claim and for damages. The defence was that the incline shaft was commenced within the lines of defendant's location upon a vein, the apex of which lay inside such surface lines extended downward vertically, and that that vein had been followed upon its dip. The plaintiff company applied for a trial with a jury:—Held, by Martin, J., dismissing the application, that before the Judicature Act the plaintiff company would have had the right to have the case tried by a jury, and that it has it now under Rule 331, but that there was an issue in the action requiring scientific investigation which could not conveniently be tried by a jury. *Iron Mask* v. *Centre Star*, 6 B.C.R. 474.

—Negligence — Suffering dog to go at large—Sheep killing.]—See NEGLIGENCE, VII.

See hereunder, XXXIX.

LX. VACATION.

—Judge in Chambers—Folle enchère.]—A Judge in Chambers cannot, during the long vacation, grant a petition for *folle enchère*. *Parent* v. *Bruneau*, 8 Que. Q.B. 377. (But he can now by 62 V., c. 52 (Que.).

—Pending trial—B.C. Rule 736 (d).]—A cause called for trial before vacation and adjourned to a day in vacation, is not a *trial pending* within the meaning of Rule 736 (*d*) and so cannot be heard during vacation. *Gill* v. *Ellis*, 6 B.C.R. 157.

— Judgment in vacation — Pending trial.] — Where a trial was called before vacation but not proceeded with, and was adjourned to a day in vacation and then proceeded with in the defendant's absence, the judgment may be set aside, as the trial was not "pending" within the meaning of Rule 736 (*d*), and so could not be heard in vacation. *Green* v. *Stussi*, 6 B.C.R. 193.

LXI. VENUE.

— Venue — Convenience — Expense — Right of plaintiff.]—The injury on account of which the plaintiff sued was received by him in the defendant's building in the County of Huron, but the plaintiff afterwards went to live in the County of Wentworth, and named Hamilton as the place of trial:—Held, that the defendant's application to change the venue to Goderich could not be granted, the difference in expense not being more than $40, and the number of witnesses in Huron County not exceeding the number in Wentworth by more than four. Held, by the Court of Appeal, refusing leave to appeal, that it was well settled practice that the plaintiff had the right to name the place of trial, and his choice would not be interfered with except on substantial grounds. *Campbell* v. *Doherty*, 18 Ont. Pr. 245.

— Criminal law — Jurisdiction — Offence commenced in one province and completed in another.]

See CRIMINAL LAW, III.

—Preponderance of convenience — View—Fair trial.]—In an application by defendants to change the place of trial from Vancouver to Victoria of an action under Lord Campbell's Act for damages for the death of plaintiff's husband caused by the collapse of a bridge within the city limits of Victoria, owing, it is alleged, to the negligence of the Corporation, it appeared that all the witnesses on both sides, except two from abroad, reside in Victoria, and that a view of the bridge by the jury was desirable. The plaintiff resisted the application on the ground that a fair trial could not be had in Victoria.—Held, by Walkem and Drake, JJ. (Irving, J., *dubitante*), that the place of trial should be changed to Victoria notwithstanding the suggestion that a fair trial could not be had there owing to the interest, adverse to the plaintiff, of the ratepayers of the defendant Corporation. It was, however, made a term of the order that the defendants should obtain a jury of the County none of whom were such ratepayers.—An order made in Chambers upon a summons duly served, no one appearing *contra*, is not an *ex parte* order, and an appeal will lie from it to the Full Court notwithstanding Rule 577; *Hudson's Bay Co.* v. *Hazlett*, 4 B.C.R. 351 distinguished. *Biggar* v. *City of Victoria*, 6 B.C.R. 130.

—Criminal cause—Change of venue—Riot at former trial—Affidavit of jurors.]

See CRIMINAL LAW, XVI.

—In actions for infringement of patents for invention.]—See PATENTS FOR INVENTION, I.

LXII. WRIT.

—Service out of jurisdiction—Breach of contract within Ontario—Defective affidavit—Leave to supplement on appeal.]—The plaintiff, desiring to bring an action against an incorporated company having its head office outside of the Province, for breach of a contract, obtained, *ex parte*, from a local Judge, an order for leave to issue a writ of summons for service out of the jurisdiction. The particular breach upon which the plaintiff relied was not set out either in the affidavit upon which the order was granted, nor in the writ when issued, nor in the statement of claim which accompanied it when served on the company abroad, and, looking at the terms of the contract, which was made an exhibit to the affidavit, there were two possible breaches upon which the plaintiff might have relied, viz., the agreement of the defendants to pay a sum of money at a place in the province, or their agreement to allot certain shares, which might have been performed outside the province for all that was provided to the contrary.—Held, that if the former were the breach relied on, the action was properly brought in this province; if the latter, it was not.—An order having been made by a Judge in Chambers setting aside the order of the local Judge and the writ and service, the plaintiff appealed to a Divisional Court, which permitted him to file a further affidavit making out a *primâ facie* case of a breach in this province entitling him to sue here, and made a substantive order allowing the service, upon proper terms as to amendment and costs, and an undertaking by the plaintiff to shew at the trial a breach of the contract within Ontario, or be nonsuit. *Franchot* v. *General Securities Corporation*, 18 Ont. Pr. 291.

Non-existent Court—Nullity.]—A document purporting to be a writ of summons stated on its face that it was "issued from the office of the deputy clerk of the District Court of the provisional district of Thunder Bay and Rainy River at Rat Portage, in and for said district," and was tested in the name of F. F., "Judge of our said Court, at Port Arthur," the 14th April, 1898. It is provided by s. 90 of R.S.O. c. 109, that when a provisional judicial district is composed, as here, [of two territorial districts, the Lieutenant-Governor in Council may by proclamation declare that the junior district shall be detached and erected into a separate provisional district. By proclamation dated the 21st February, 1898, it was declared that on and after the 4th April then next the district of Rainy River should be detached from Thunder Bay and erected into a separate district. The writ was, in fact, issued by the person who was, before the 4th April, the deputy clerk of the District Court at Rat Portage, but at the time of the issue no Judge or officers had been appointed for the District Court of the new district. The defendants entered a conditional appearance, pleadings were delivered entitled in the District Court of Rainy River, the defendants in theirs objecting to the jurisdiction; and the case came on for trial before the Judge of the District Court of Thunder Bay, at Rat Portage, who, the defendants again objecting, directed all amendments to be made to get rid of the objections, and, after a trial with a jury, gave judgment for the plaintiff:—Held, on appeal, that the writ was a nullity and incapable of amendment so as to make it good; that the defect was such as could not be waived by the defendants; it was a complete defect; and the proceedings should be stayed *in toto*, and the plaintiff ordered to pay the defendants' costs from the beginning. *Hewgill* v. *Chadwick*, 18 Ont. Pr. 359.

—Renewal—Withholding of evidence—Statute of Limitations.]—Where orders were made from time to time renewing a writ of summons, and it appeared that the plaintiff all the time knew, but did not disclose, where the defendant could be served, and the Statute of Limitations had, but for the renewals, barred the plaintiff's claim, the orders were rescinded, upon an application by the defendant under Rule 358, after the orders had come to his knowledge. *Mair* v. *Cameron*, 18 Ont. Pr. 484.

—Summons—Description of plaintiff.]—Where a foreign corporation plaintiff was described in the writ of summons as "a body corporate, duly incorporated having its principal place of business in Canada, in the City of Montreal," the description was sufficient, the defendant's right to security for costs, if such right he had, not being prejudiced thereby. *Bank of British North America* v. *Howley*, 14 Que. S.C. 422.

—Summons—Description of plaintiff in the writ—Art. 122 C.C.P.]—Where one of the plaintiffs was described in the writ of summons as "formerly of the town of Westmount, presently of parts unknown," the description was insufficient under Art. 122, C.C.P. *Taylor* v. *Lewis*, 14 Que. S.C. 431.

—Writ and declaration—Certified copy—Arts. 117, 123 C.C.P.]—The writ and declaration forming together a single authentic document the omission to certify the copy of the writ does not nullify the proceedings if the copy of the declaration is certified. *United Counties Ry. Co.* v. *Sisters of the Precious Blood*, 2 Que. P.R. 6.

—Irregular description of plaintiffs—Exception to the form.]—Where plaintiffs were described as "the Protestant Board of School Commissioners of Outremont," while their proper description is "the School Commissioners for the Municipality of Outremont, in the County of Hochelaga," an exception to the form will be maintained unless an amendment is made. *Protestant Board* v. *Cook*, 2 Que. P.R. 220.

—**Absent defendant.**]—The writ should state precisely the last known residence of the defendant when he is absent from the Province. *Longpré* v. *Perkins*, 2 Que. P.R. 307.

—**Writ issued for debt or liquidated demand—Amendment—Costs—Affidavit for capias.**]—Defendant applied to a Judge at Chambers to set aside with costs the writ of summons issued by plaintiff, and the service thereof, and also the capias or order for defendant's arrest, and all proceedings thereunder, on the following, among other, grounds:—because the provisions of O. 3, R. 6, of the Judicature Act, were not complied with, by stating in the indorsement the amount claimed for costs, or that upon payment of the amount claimed to the plaintiff, or his solicitor, within six days from the service of the writ, further proceedings would be stayed, and because the affidavit upon which the capias was issued did not shew that any writ of summons was issued at the time the same was sworn to. The application having been dismissed:—Held, that plaintiff's claim being for a debt or liquidated demand only, compliance with O. 3, R. 6, was compulsory, that the writ, if not amended, must be set aside as irregular, and that the Chambers Judge was wrong in dismissing the application. Held, nevertheless, that the English practice should be followed, and that plaintiff should have leave to amend on payment of costs of the motion at Chambers, and of the appeal; that defendant should have six days from the service of the amendment to comply with the terms of the notice; and that if the amendment was not made within five days, and the costs paid within twenty days, the appeal should be allowed with costs, and the writ and order for arrest set aside, and the bail bond delivered up to be cancelled. Held, further, that the place of residence of the plaintiff was sufficiently shewn in his affidavit, in which he was described as "of Halifax, in the County, Professor in Dalhousie College." Held, also, that the objection taken to the affidavit upon which the capias was issued, that it did not shew that any writ of summons was issued at the time it was sworn to, could not be sustained, O. 44, R. 1 not requiring the affidavit upon which the order for arrest is based to contain such a statement. *Murray* v. *Kaye*, 32 N.S.R. 206.

—**Subpœna — Alterations.**] — *Quære*, whether alterations and interlineations in a subpœna, not authenticated by the prothonotary, do not make it invalid. *Unger* v. *Long*, 12 Man. R. 454.

—**Law Stamp Act, B.C.—Unstamped summons—Power of Court to affix stamp after judgment.**]—No law stamps being obtainable, a County Court summons was issued and served without being stamped, and judgment was signed in default. Forin, Co. J., on the ex parte application of the judgment creditor after judgment, ordered the stamp to be affixed under s. 15 of the Law Stamp Act, C.S.B.C. 1888, c. 70, and afterwards refused an application by the defendant company to set aside the judgment. Upon appeal to the Full Court from the refusal to set aside the judgment:—Held, per Davie, C.J. (Drake and McColl, JJ., concurring), dismissing the appeal, that the omission to affix the law stamps did not, under the circumstances, constitute a knowing and wilful violation of the Act, and the order for the due stamping of the process was therefore properly made. *Aldrich* v. *Nest Egg Company*, 6 B.C.R. 53.

—**Writ of execution—Where addressed—Opposition—Art. 555 C.C.P. (old text).**]

See EXECUTIONS, I.

—**Renewal of writ in adverse action—B.C. Mineral Act.**]—See MINES AND MINERALS, II.

—**Order for return after expiry of delay—Condition—Motion to annul—Arts. 151, 154 C.C.P.**]

See hereunder, XLIV.

—**Specially indorsed writ—Nullity—Judgment.**]

See hereunder, XXXVIII.
And see ACTION.
" " APPEAL.
" " CRIMINAL LAW.
" " PLEADING.

PRESCRIPTION.

See LIMITATION OF ACTIONS.
" WATERS AND WATERCOURSES.

PRINCIPAL AND AGENT.

I. AGENCY.

—**Telegraph company—Operator.**]—The operator of a telegraph company, who receives and transmits the message is not the agent of the sender. *Bérubé* v. *Great Northwestern Telegraph Co.*, 14 Que. S.C. 178.

II. AGENTS' COMMISSION.

—**Commission of agent on sale of land.**]—Defendant authorized plaintiffs, real estate agents, to sell certain property of his for $14,400, and agreed in the event of sale to pay the usual commission. Plaintiffs then introduced to defendant an investor, shewed him the property and tried to effect a sale. The same person afterwards purchased the property for $14,000, but through another agent:—Held, that the plaintiffs were not entitled to the full commission, and that the verdict of the County Court Judge allowing half commission should not be disturbed. *Glines* v. *Cross*, 12 Man. R. 442.

III. Agent's Liability to Principal.

— Contract — Unlawful consideration — Non-fulfilment.]—Where money is placed by a person knowingly in the hands of an agent or intermediary to be paid to a third party, and is by the agent so paid, in order to secure the influence of such third party on behalf of the person advancing the money, an action by the principal, on the ground that the agreement was not fulfilled, does not lie against the intermediary for the recovery of the money so advanced. *Latraverse* v. *Morgan*, 14 Que. S.C. 511.

IV. Agent's Recourse Against Principal.

— Insurance agent — Commission on renewal premiums.]—The defendant, by his contract with the company plaintiff, was to be allowed as compensation, "a commission on the original or renewal cash premiums which shall during his continuance as such agent (of plaintiff) be obtained, collected, paid to, and received by said (plaintiff) up to and including the —— year of assurance, should his agency continue so long, on policies of insurance effected with the (plaintiff) by or through the (defendant), at and after the following rates." (Here followed rates of commission on original cash premiums for the several classes of insurance, also schedule of rates of commission on renewal of premiums:—Held, that the defendant, under the above agreement, after he had ceased to be employed by the company plaintiff, was no longer entitled to any commission on the renewal premiums received by the company on the business which had been obtained by the defendant, on which renewals, if he had remained in the company's service, he would have been entitled to the rates specified in his agreement. *New York Life Ins. Co.* v. *Dubeau*, 15 Que. S.C. 100.

V. Mandataire.

—Conditional loan—Legal tender—Notary as agent or mandatary.]—Guay entrusted money to the hands of Fortin, a notary public, to the end of having a legal tender thereof made to one Audet. The legal tender was to be made at the request and in favour of Blanchet, the plaintiff: Guay merely provided the money therefor, under the express condition that such money would be returned to him if the offer was refused:—Held, that under these circumstances, Fortin was Guay's agent or mandatary to safely keep the money and to return it to him if a certain condition happened, viz: Audet's refusal. Fortin was Blanchet's mandatary to properly make the offer to Audet. *Blanchet* v. *Roy*, 14 Que. S.C. 402.

VI. Power and Authority of Agent.

—Fire insurance—Condition in policy—Time limit—Condition precedent—Waiver.]—A person not an officer of an insurance company, appointed to investigate the loss and report thereon to the company, is not an agent having authority to waive compliance with conditions precedent to liability, and if he has such authority he can not, after the fifteen days for delivery of proofs had expired, extend the time without express authority from his principal. *Atlas Assurance Co* v. *Brownell*, 29 S.C.R. 537.

—Fire insurance—Condition precedent—Waiver.]—Neither the local agent for soliciting risks nor an adjuster sent for the purpose in investigating the loss under a policy of fire insurance, has authority to waive compliance with conditions precedent to the insurer's liability or to extend the time thereby limited for their fulfilment. *Atlas Assurance Co.* v. *Brownell*, 29 S.C.R. 537 followed. *Commercial Union Assurance Co.* v. *Margeson*, 29 S.C.R. 601.

—Authority to sell real estate—Deviation from instructions of principal.]—M. held a power of attorney from the defendant, but this did not authorize him to sell defendant's real estate. He was, however, instructed by defendant's solicitor to divide the property into lots and sell at the best prices he could get. M. then wrote for a power of attorney to sell, to which defendant's solicitor replied that defendant was then absent. Before receiving a power of attorney, M. sold the property *en bloc* to plaintiff, part of the price only to be paid in cash, and a commission of ten per cent. to go to an intermediary. Defendant refused to complete the sale:—Held, that, even if the instructions given to M. by defendant's solicitor constituted M. an agent for the sale of the property, the fact that M. had not complied with the request to divide the land into lots, and had given time for part of the price, and agreed to pay a commission of ten per cent., justified the defendant in refusing to complete the sale. *Amyot* v. *Daulnais*, 15 Que. S.C. 311.

—Action—Service on agent—Special mandate—Art. 136 C.C.P.]

See Practice and Procedure, LIII.

—Liability of principal—Excess of agents' powers—Apparent scope of authority—Power of attorney—Deposit of, in registry office.]—Defendant gave to his father, A. H., a power of attorney to carry on a general trading business, for cash only, or barter, or exchange of goods, with moneys supplied by defendant from time to time for that purpose, but giving A. H. no power or right whatsoever to make, accept or indorse any promissory note for defendant, or in his name, or to pledge his credit to any extent whatever, without further authority. Subsequent to the giving of the power of attorney, defendant instructed A. H. that he was not to purchase any goods from plaintiff. A. H., in violation of these instructions, purchased goods from plaintiff and gave a note for the amount. In an action by plaintiff, seeking to recover from defendant the amount claimed for the goods so sold, evidence was given by A. H.

to the effect that defendant must have found out by the books and papers that he was dealing with plaintiff. There was also some evidence of defendant from which it might be inferred that A. H. could purchase goods on credit, provided defendant knew of it:—Held, per Graham, E. J. (Henry, J., concurring), that the trial Judge was justified in coming to the conclusion that the purchase of goods on credit was within the apparent scope of the powers of A. H. as agent. Also, that the deposit of the power of attorney in the office of the registrar of deeds could not affect the case in the absence of a statute giving efficacy to such deposit. Also, that the fact that the goods were charged in plaintiff's books to A. H., without using the word "agent," and that a note was taken from A. H. in his own name, for the amount, was not sufficient reason for disturbing the finding of the trial Judge, that the credit was given to defendant, plaintiff being aware at the time that A. H. was defendant's agent, and A. H. having no credit of his own. *Kenny* v. *Harrington*, 31 N.S.R. 290.

—Action against company—Service—Commission agent—Arts. 140, 142 C.C.P.]

See PRACTICE AND PROCEDURE, LIII.

PRINCIPAL AND SURETY.

I. CREATION OF SURETYSHIP.

—Indorsement of surety by third party—Rights of principal on.]—When at the foot of an instrument of suretyship regularly signed by the surety a third party placed his initials with the word "correct," and it is established in the cause that he did not intend to make himself liable with the surety, but merely to guarantee the latter's solvency, such third party is liable neither jointly and severally (*solidairement*) nor jointly with the surety, but is only an indorser of the latter, and the creditor has no recourse against him, at all events without first proceeding against the surety. *Crépeau* v. *Beauchesne*, 14 Que. S.C. 495.

—Promissory note—Incomplete instrument—Parties—Suretyship—Bankruptcy of indorser.]

See BANKRUPTCY AND INSOLVENCY, V.

II. DISCHARGE OF SURETY.

—Postmaster's bond—Penal clause—Lex loci contractus—Negligence—Laches of the Crown officials—Release of sureties—Arts. 1053, 1054. 1131, 1135, 1927, 1929-1965 C.C.]

See CROWN, III.

—Bond—Municipal treasurer—Audit—Representations.]—The treasurer of a county for a number of years embezzled county funds and by manipulation of his books deceived the county auditors who from year to year reported in good faith that his accounts were correct, and the council in good faith adopted the reports. While in fact in default to a large amount, the defendant, who was a ratepayer resident in the county and a relative of the treasurer, became at his request one of his sureties, and at the time was told in good faith by a member of the council and some of the county officials that the treasurer's accounts were correct:—Held, that the auditors' reports so adopted by the council were not implied representations by the council, the incorrectness of which discharged the defendant; Held, also, that the statements made by the member of the council and the county officials did not bind the council, and that even if they did, having been made in good faith, they formed no defence. *County of Simcoe* v. *Burton*, 25 Ont. App. 478.

—Mortgage—Extension—Novation—Discharge of surety.]—A mortgage of leasehold lands to secure $5,000 made by three trustees and executors under a will recited their appointment, and that the moneys were required for the purpose of the estate, the mortgage being under the Short Form Act, and containing the usual covenant for payment by mortgagors. In 1888, under the provision therefor in the will, a new executor and trustee was appointed, the retiring one of the original three being released, and all his interest vested in his successor and those remaining. In 1892, while $3,000 still remained due, the security being greatly diminished in value, and worth no more than the amount then due on it, the plaintiffs, with a full knowledge of all the facts, entered into an agreement under seal with the then executors and trustees for an extension of the time for payment of the principal, which though providing for a reduction of the rate of interest, also provided for its being compounded, and that the rate was to apply as well before as after maturity. The agreement contained a covenant by the then executors and trustees to pay the mortgage money, and also a proviso that the extension was consented to in as far as the company might do so without infringing on or in any way affecting the interests of other parties in the mortgaged premises, all rights and remedies against any security or securities the company might have against any third person or persons upon the original security being reserved:—Held, that the agreement to extend the mortgage was in effect a transaction for a new loan on different and more onerous terms, and that as between the executors and trustees, as last constituted, and the one who had retired the relationship of the principal and surety was created, and, by virtue of the agreement, notwithstanding the reservation of remedies, the surety was discharged. *Canada Permanent Loan and Savings Co.* v. *Ball*, 30 Ont. R. 557.

—Capias—Principal relieved from obligation.]—Where a person was arrested under a writ

of *capias ad respondendum*, and the present defendant gave bail to the sheriff, and subsequently the debtor made an abandonment of his property for the benefit of his creditors and gave due notice thereof, and his *bilan* having remained uncontested during the four months following the notices, he was relieved from the effect of the *capias*, his surety on the bail bond was also discharged from his obligation. *McClary Manfg. Co.* v. *Morin*, 14 Que. S.C. 423.

—Partnership—Acceptance in firm name by one partner for private debt—Suretyship.]

See PARTNERSHIP, IV.

III. PROCEEDINGS AGAINST SURETY.

—Judgment against principal—Proof required against surety and third party—Administration bond.]—The plaintiff having an unsatisfied judgment against the administratrix of an estate, procured an assignment of the administration bond and brought an action thereon against the sureties, when a person, who had indemnified the sureties was made a third party under the order whereby the question of the indemnity was to be tried after the trial of the action, as the Judge might direct, with the liberty to appear by counsel and defend the action, and to call and cross-examine witnesses, and it was also ordered that he should not thereafter be at liberty to dispute the defendant's liability, if any, to the plaintiff. At the trial the judgment was put in and one of the defendant's called as a witness, who stated that the amount of the judgment was correct. It was objected on behalf of the third party that the liability had not been properly proven as against him, and there should be a reference to ascertain and determine the defendant's liability, which was refused, and judgment entered for the plaintiff:—Held, the judgment so recovered was not sufficient to bind the third party, and a new trial was directed. *Zimmerman* v. *Kemp*, 30 Ont. R. 465.

PRIVILEGE.

—Builder—Privilege registered under amending statute—Prescription—59 V., c. 42 (P.Q.)—Materials—Art. 2013b C.C.]—See LIEN, I.

—Workman—Logs cut for contractor—Notice—Art. 1994c C.C.—Arts. 192, 919, 945, 956 C.C.P.—57 V., c. 47 (P.Q.).—See LIEN, IX.

—Privilege of builder—Demand for statement—Incompatibility with personal demand—Art. 2013 C.C.]

See PRACTICE AND PROCEDURE, XLV.

—Judicial sale—Privileged creditor—Opposition à fin de conserver—Arts. 670, 672, 673 C.C.P.]

See PRACTICE AND PROCEDURE, XLIII.
And see LANDLORD AND TENANT.
" LIEN.
" MORTGAGE.

PROBATE COURT.

—Administration granted of goods omitted from inventory—Adverse possession—Statute of Limitations.]—On the settlement of the estate of C., deceased, it was found that the sum of $2,188.15 was due to E. W. D., the surviving administrator, but that there were no assets out of which the same could be paid. The petitioner, who was acting administrator of the estate of E. W. D., applied to the Court of Probate for the County of Hants for administration *de bonis non* of the estate of C., alleging that, at the time of his death, C. was interested in certain property, gypsum rocks and quarries, which escaped the notice of his administrators, and had not been included in the inventory of his estate.—Held, affirming the judgment of the Probate Court, that petitioner was entitled to the administration prayed for.—Held, also, that the Court could not consider or deal with the questions whether the right of C. to the property had been lost by adverse possession, or whether petitioner's right of action was barred by the Statute of Limitations. *Re Cunningham*, 31 N.S.R. 261.

—Decree—Jurisdiction—Fund set apart and separated from assets of estate.—By the third clause of his will testator bequeathed to A. E. R. and C. C. M., the interest arising from certain sums of money, the principal moneys, on the death of A. E. R. and C. C. M., to be divided, share and share alike, among other children of testator. By a subsequent clause of the will a further sum of money was set apart, the interest arising from which was to be paid to testator's sons, J. A. M. and L. R. M., as compensation for their trouble in investing and taking care of the money to be invested for the purposes mentioned in the previous clause. On the petition of A. E. R. and C. C. M., a citation was issued to the executors of D. M., requiring them to appear and settle the estate, and a decree was made by the Judge of Probate for the County of Annapolis, against the executors, and in favour of A. E. R. and C. C. M., for arrears of interest claimed to be due to them. The fund set apart for A. E. R. and C. C. M., prior to the proceedings in the Court of Probate, having been set apart and separated from the assets of the estate:—Held, setting aside the decree with costs, that the estate was not liable for any claim against, or arising out of, that fund; that neither of the claimants was a creditor of, or otherwise interested in, the estate; and that the Judge of the Probate

had no authority to hold the enquiry, or to make the decree appealed from. *Re Morse*, 31 N.S.R. 416.

—Citation to close estate—Judgment refusing application—Action by assignee of judgment against administratrix.] — An action was brought by the widow and administratrix of A. O'N., claiming damages for trespass to land committed after her husband's death. Judgment was given against the administratrix, for costs, and, subsequently, she gave a chattel mortgage to her solicitor to cover his costs and the fees of administration. Plaintiff, having obtained an assignment of the judgment and of the chattel mortgage, and claiming to be a creditor of the estate, obtained a citation from the Judge of Probate calling upon the administratrix to shew cause why the estate should not be closed, or the letters of administration cancelled. On the return of the citation, the Judge of Probate disallowed plaintiff's claim, as a charge against the estate, and refused to cancel the letters of administration, etc. From this decree there was no appeal. Plaintiff, subsequently, alleging himself to be a creditor of the estate, commenced an action against the widow and infant children, claiming payment of the amount alleged to be due him under the two assignments:—Held, that the decree of the Judge of Probate on the citation to settle the estate, unappealed from, was a bar to the action; Held, also, that plaintiff was not a creditor of the estate; Held, also, the administratrix had no right to interfere with the real estate, until the Judge of Probate had decided that the personal estate was insufficient to pay debts, and directed that the real estate should be sold. *Granger* v. *O'Neil*, 31 N.S.R. 462.

PROCÈS-VERBAL.

—Nullity—Ultra petita—Parties.] — The absolute and entire nullity of a *procès-verbal* having been asked for by a ratepayer, the tribunal, without adjudging *ultra petita*, can only annul it as to this ratepayer.—In an action demanding the nullity of a *procès-verbal* of a watercourse, it is sufficient that the corporation confirming this *procès-verbal* be *mise en cause*. *Comtois* v. *Dumontier*, 8 Que. Q.B. 293.

—Execution—Procès-verbal of seizure—Opposition—Art. 630 C.C.P.]—See EXECUTIONS, IV.

—Highways—Superintendent—Homologated procès-verbal—Petition to quash—Prescription—Arts. 100, 1081 M.C.]

See MUNICIPAL CORPORATIONS, VI.

PROCLAMATION.

—Quebec Election Act, 59 V., c. 9, ss. 196, 321—Prescription—Proclamation of candidate elected.]

See PARLIAMENTARY ELECTIONS.

PROHIBITION.

—Issue of writ—Rectification of judgment by.] —Recourse cannot be had to a writ of prohibition to rectify the decision, however erroneous it may be, of an inferior Court. *Bar of Montreal* v. *Honan*, 8 Que. Q.B. 26.

And see ATTORNEY.

—Municipal corporation — Committee — Judicial functions.]—Persons composing a Committee of Inquiry, who exceed their powers and seek to exercise judicial functions, cannot invoke the fact that they do not by law constitute a Court, as an answer to a proceeding seeking to have them prohibited from acting as a Court and usurping judicial powers. *Lussier* v. *Corporation of Maisonneuve*, 15 Que. S.C. 45.

—Magistrate's decision not given in open Court —Waiver.]—S. 15 of the B.C. Small Debts Act, which provides that the decision of the Magistrate must be given in open Court, may be waived either expressly or by the conduct of a suitor, and prohibition in such case will be refused. *Chase* v. *Sing*, 6 B.C.R. 454.

—County Court—Jurisdiction—Unsettled account —Prohibition.]—See COUNTY COURT.

— Harbour commission — Defective information and complaint — Restraint of action on.]

See HARBOUR COMMISSION.

PUBLIC HARBOUR.

See HARBOUR.

PUBLIC OFFICER.

— Action against — Notary — Notice — Art. 22 C.C.P. (old text) — Prescription — Arts. 2598, 3607 R.S.Q.]

See ACTION, XVIII.
" LIMITATION OF ACTIONS, VI.

—City assessor—Garnishment—Seizure of wages —Art. 599 C.C.P.]—See GARNISHEE.

QUI TAM ACTION.

—Defence—Improper motive.]

See ACTION, VII.

—Appeal—Quashing conviction—Certificate of Attorney-General—Costs against prosecutor.

See ATTORNEY-GENERAL.
See PRACTICE AND PROCEDURE, XLIX.

QUO WARRANTO.

—Municipal election—Qualification of councillor.]—*Semble*, after expiry of the delays for contesting a municipal election the qualification of a councillor cannot be brought in question by writ of *quo warranto* for reasons that would have served as a ground for contesting the election. *Chalifoux* v. *Goyer*, 14 Que. S.C. 170.

And see MUNICIPAL CORPORATIONS.

—Municipal councillor—Election—Qualification—Discretion—Art. 987 C.C.P.]—The qualification of a municipal councillor may be contested on proceedings by *quo warranto* under Arts. 987 *et seq* C.C.P. although the causes of disqualification existed at the time of the election. The mode of contesting an election by petition, provided by Arts. 4275 *et seq* of the Municipal Corporations Act, does not prevent recourse to the writ of *quo warranto*. On application for the issue of the writ the Court here has only the same discretion as may be exercised in England. *Lemire* v. *Neault*, 15 Que. S.C. 33.

—Municipal council—Disqualification of councillor—Resignation—Re-election.]

See MUNICIPAL CORPORATIONS, VI.

—Municipal council—Qualification of councillor—Contestation of election—Arts. 203, 283, 346 M.C.]—See MUNICIPAL CORPORATIONS, XVII.

RAILWAYS AND RAILWAY COMPANIES.

I. CONTRACTS FOR CONSTRUCTION.
II. EXPROPRIATION OF LANDS.
III. INJURY TO PERSONS.
IV. INJURY TO PROPERTY.
V. INSOLVENT COMPANY.
VI. OFFICERS AND SERVANTS.
VII. RAILWAY BONDS AND SUBSIDIES.
VIII. ROADBED.
IX. RUNNING OF TRAINS.
X. SLEEPING CARS.
XI. SUNDAY LABOUR.
XII. TAXATION OF RAILWAY PROPERTY.

I. CONTRACTS FOR CONSTRUCTION.

—Conditions as to payment of labourers—Certificates—Termination of contract.]

See CONTRACT, VI *(a)*.

II. EXPROPRIATION OF LANDS.

—Tenants in common—Propriétaries par indivis—Plans and books of reference.]—In matters of expropriation where the railway company has complied with the directions and conditions of articles 5163 and 5164, Revised Statutes of Quebec, as to deposit of plans and books of reference, notice and settlement of indemnity with the owners, or with at least one-third of the owners *par indivis*, of lands taken for railway purposes, the title to the lands passes forthwith to the company for the whole of the property by mere operation of the statute, even without the consent of the other owners *par indivis*, and without the necessity of formal conveyance by deed or compliance with the formalities prescribed by the Civil Code as to registration of real rights. The provisions of the Civil Code respecting the registration of real rights have no application to proceedings in matters of expropriation of lands for railway purposes under the provisions of the Revised Statutes of Quebec:—Held, that the terms of s.s. 10, of article 5164 R.S.Q., were sufficiently wide to include and apply to donations; that the instrument in question was not properly a donation, but a valid agreement or *accord* within the provisions of s.s. 10, under onerous conditions of indemnity which appeared to have been satisfied by the company; that, as the agreement stipulated no time within which the new plan should be filed, and the location appeared to have been made to the satisfaction of the required proportion of the owners, it was sufficient for the company to file the amended plan and book of reference at any time thereafter, and that, as the indemnity agreed upon by six out of nine of the owners *par indivis* had been satisfied by changing the location of the railway line as desired, the requirements of article 5164 R.S.Q., had been fully complied with and the plaintiff's action could not, under the circumstances, be maintained. *Quebec, Montmorency & Charlevoix Railway Co.* v. *Gibsone*, 29 S.C.R. 340.

—"Owner"—Person in possession—Title—Jus tertii.]—By s. 103 of the Railway Act of Canada, 51 V., c. 29, the lands which may be taken without the consent of the owner shall not be more than 650 yards in length by 100 yards in breadth. The defendants desired to use for their railway a tract of land more than 650 pards long of which the plaintiff was in possession, and they alleged that a strip in the middle of the tract was ordnance land of the Crown, and therefore sought to expropriate two pieces, one on each side of the alleged ordnance reserve, which latter the plaintiff claimed as his own by length of possession:—Held, that the scheme of the Act is that the company shall deal with the person in possession as owner, and if the company propose to disturb that possession, it must be pursuant to the powers conferred by the Act; the matter of title is to be held in abeyance until a later stage in the expropriation proceedings. The company cannot, even in the case of defective title, ignore the person who actually occupies the land as owner, and proceed as if his interest had been duly invalidated by legal process on the part of the real owner. Though part of the land be held by a pre-

carious tenure, yet where there is possession of the whole as one property, there should be but one set of proceedings and one arbitration, and the whole should be dealt with under the statute as the property of one and the same owner. *Stewart* v. *Ottawa & New York Ry. Co.*, 30 Ont. R. 599.

—Expropriation against several owners—Objection to arbitrator—Separate demands for recusation—Consolidation—Judgment in Chambers—Appeal from.]—See APPEAL, V.

—Arbitration proceedings—Date fixed for award—Extension—Indemnity.]

See ARBITRATION AND AWARD, V.

III. INJURY TO PERSONS.

—Government railway—Accident to the person—Liability of Crown—Negligence.]—It is not negligence *per se* for the engineer or conductor of a train to exceed the rate of speed prescribed by the time-table of the railway. If the time-table were framed with reference to a reasonable limit of safety at any given point, then it would be negligence to exceed it; but, *aliter*, if it is fixed from considerations of convenience and not with reference to what is safe or prudent. In an action against the Crown for an injury received in an accident upon a Government railway, the suppliant cannot succeed unless he establish that the injury resulted from the negligence of some officer or servant of the Crown while acting within the scope of his duties or employment upon such railway. The Crown's liability in such a case rests upon the provisions of 50-51 V., c. 16, s. 16 (*c*). *Colpitts* v. *The Queen*, 6 Can. Ex. C.R. 254.

—Statutory duty—Common employment—Negligence of fellow-servant.]—S. 289 of the Dominion Railway Act, 51 V., c. 29, giving to any person injured by the failure to observe any of the provisions of the Act a right of action "for the full amount of damages sustained" is *intra vires*, and the limitation of amount mentioned in the Workmen's Compensation for Injuries Act does not apply to an action by a workman or his representatives under this section. Where a statutory direction imposed upon an employer has not been observed it is no defence that its non-observance is due to the negligence of a fellow-servant of the person injured. The widow and child of a person killed in consequence of the defendants' negligence may, when letters of administration to his estate have not been issued, bring an action under R.S.O. c. 166, without waiting six months. The Court thinking that the damages awarded by the jury in an action for causing death were excessive ordered that there should be a new trial unless the plaintiffs accepted a reduced amount. *Curran* v. *Grand Trunk Ry. Co.*, 25 Ont. App. 407.

—Connecting lines—Negligence—Cattle drover's pass.]—A contract was made by a railway company for the carriage of cattle to a point on the line of a connecting railway company at a fixed rate for the whole journey. The contract provided that the shipper (or his drover) should accompany the cattle; and that the person in charge should be entitled to a "free pass," but only "on the express condition that the railway company are not responsible for any negligence, default, or misconduct of any kind on the part of the company or their servants":—Held, that the condition was valid and could be taken advantage of by the connecting railway company, who therefore were not liable to the shipper for injuries suffered by him in a collision caused by their servants' negligence. *Bicknell* v. *Grand Trunk Ry. Co.*, 26 Ont. App. 431.

—Rails on public street—Accident from—Responsibility.]

See MUNICIPAL CORPORATIONS, XI.

IV. INJURY TO PROPERTY.

—Powers of Provincial Legislature—British Columbia Cattle Protection Act.]—The provision in the British Columbia Cattle Protection Act, 1891, as amended in 1895, to the effect that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, is *ultra vires* of the Provincial Parliament. *Canadian Pacific Ry. Co.* v. *Parish of Notre Dame de Bonsecours* [1899], A.C. 367, distinguished. *Madden* v. *Nelson and Port Sheppard Ry. Co.* [1899], A.C. 626, affirming 5 B.C.R. 541, C.A. Dig. (1898), 401.

—Responsibility—Culvert—Possessory action—Costs.]—The defendant company built a culvert over a watercourse which drains the plaintiff's properties. This culvert was too narrow, and caused the waters of the stream to flood back and inundate the said properties:—Held, that the defendant, under these circumstances, was in law liable for whatever damage the insufficiency of the culvert caused the plaintiff.—As the action was of a possessory character, the full costs were granted, though the amount of damages proved and allowed was inferior to that claimed by the action. *Robitaille* v. *Canadian Pacific Ry. Co.*, 15 Que. S.C. 246.

—Flooding of adjoining land caused by railway embankment—Damages—Negligence.]—The plaintiffs were the owners of land having a slope and natural drainage towards the sea. The defendants under authority of an Act of Parliament had constructed a line of railway through this land (which was then owned by the plaintiffs' predecessors in title) and had thereby cut off the ditches which had been constructed on the lands in question for the purposes of drainage. The defendants, for purpose of protecting their line cut a ditch

parallel with the embankment on which the line was built and cutting across the ditches on the plaintiffs' lands, which thereafter emptied into the defendants' ditch. The defendants constructed a flood gate for their ditch, and the flood gate being insufficient to carry off the water accumulated in the defendants' ditch, the plaintiffs' lands were flooded:—Held, that under the defendants' special Act (incorporating s. 16 of the Railway Clauses Consolidation Act, 1845) the construction of the embankment and ditch were authorized by the Legislature and that the plaintiffs could not complain of the flooding of their lands caused by the construction of the embankment; Held, also, that no duty or obligation was imposed on the defendants to see that the plaintiffs had an outlet through their ditch for the water which collected on their lands. *Hornby* v. *New Westminster Southern Ry. Co.*, 6 B.C.R. 588.

—Negligence — Findings of jury — Concurrent findings of Courts appealed from.]

See NEGLIGENCE, XVI.

V. INSOLVENT COMPANY.

— Receiver — Foreign appointment — Ester en justice — Seizure of property — Immovables by destination — Arts. 6, 1968, 1981 C.C.]

See CONFLICT OF LAWS.

VI. OFFICERS AND SERVANTS.

— Contract — Corporate seal — Usual expenses, what included in.]—The plaintiff was engaged by the president of the defendant railway company to act as chief engineer of the railway at a salary of $250 per month, besides his "usual expenses," and served in that capacity for about nineteen months. —Held, that he was entitled to recover at the rate agreed on for his services, although there was no contract under seal. *Bernardin* v. *North Dufferin*, 19 S.C.R. 581 followed.—Held, also, that the plaintiff's board while at his headquarters was not included in the "usual expenses" which he was to receive in addition to his salary, but sums paid out for board while away from his usual quarters on the company's work would be so included. *Forrest* v. *Great Northwest Central Ry. Co.*, 12 Man. R. 472.

—Master and servant—Personal injuries—Precautions — Fellow-servant.] — The plaintiff, a conductor in employ of defendant company, was injured while uncoupling cars on a side track, the accident being caused by the plaintiff's foot becoming entangled in the long grass which had been allowed to grow on the track. The company had a section-man and roadmaster whose duties were to keep the road in order.—Held, in a common law action for damages that the company was not liable.—A railway company is not liable for personal injuries sustained by an employee by reason of a defect in the track, provided the track was properly constructed and competent workmen were employed to keep it in order. *Wood* v. *Canadian Pacific Ry. Co.*, 6 B.C.R. 561.

—Discovery—Examination of Roadmaster.]

See PRACTICE AND PROCEDURE, XX.

VII. RAILWAY BONDS AND SUBSIDIES.

—Guarantee by the Government of interest on bonds—Constitutional limitations.]—A railway company having obtained subsidies from the Government for the construction of a line of railway, and having the right to obtain a guarantee of interest on its bonds by reason thereof, has the right to transfer the same to any other railway company which acquires its franchises for the construction and maintenance of its line of railway; and such assignee is entitled to the guarantee of interest.—The granting of a guarantee of interest by the Government on the bonds of a railway company is made in order to encourage and aid the building of railways, and thereby to benefit the inhabitants of the parts of the province through which they run, and statutes of this kind must receive a fair, large and liberal construction, so as to attain and secure the object which they have in view.—The guarantee of interest can only be given on bonds which a railway company has the right by its charter to issue, and such issue is generally for a certain amount per mile of the portion of the railway constructed and of the portion which has not been constructed, but of which the building has been contracted for. The policy of the Legislature being to assist the progress and to promote the prosperity of the province, by aiding the construction of railways, no restriction should be made as to the section of the railway on which the bonds for which the interest is to be guaranteed are to be issued, as such limitation would tend to restrict the beneficial intention of the Legislature, in authorizing the Government to grant a guarantee of interest. The only restriction with respect to the issue of bonds of which the interest is to be guaranteed, is the limit to which a company is restricted by its charter.—The Sovereign has the right, by Order-in-Council, to deal with all matters respecting the Government of the country or the administration of its public affairs when its action is not restricted by a constitutional principle or by a prohibitory statute. The Crown is restricted with respect to the employment of moneys derived from the public property or raised by the taxes imposed upon the people, and it has no right to appropriate, take or use such moneys or taxes without a specific grant. But in the present case the execution of the contract entered into does not require the expenditure of any public moneys, and, therefore, there is no constitutional limitation and no statutory prohibition against the contract which was entered into, such contract being *intra vires* of the Government of the province, even without any authority from the statutes

referred to. In consequence, the Order-in-Council of the 27th April, 1897, which grants a guarantee by the Government for the payment of interest upon bonds to be issued by the Atlantic & Lake Superior Railway Company upon the deposit of the amount necessary to meet such interest, is not *ultra vires*. *Province of Quebec* v. *Atlantic & Lake Superior Ry. Co.*, 8 Que. Q.B. 42.

—Special subsidy—Branch line—Exemption from taxation.]—See ASSESSMENT AND TAXES, VI.

VIII. ROADBED.

—Canada Railway Act, s. 262—Construction—Railway Committee of Privy Council.—Under the true construction of the Railway Act (Canada), 51 V., c. 29, the power conferred by s.s. 4 of s. 262 upon the Railway Committee of the Privy Council to exonerate a railway company during a specified portion of the year from the duty of filling certain spaces specified in s.s. 4, does not apply to the duty imposed by s.s. 3 of filling certain other spaces specified by s.s. 3. Such extension of power is not authorized by the grammatical construction of the sub-sections nor rendered imperative by the context. *Grand Trunk Railway Co.* v. *Washington*. [1899] A.C. 275, affirming 28 S.C.R. 184.

IX. RUNNING OF TRAINS.

—Approaching crossing—Warning—Shunting.—Section 256 of the Railway Act, 1888, providing that "the bell with which the engine is furnished shall be rung, or the whistle sounded at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway" applies to shunting and other temporary movements in connection with the running of trains as well as to the general traffic. *Canada Atlantic Railway Co.* v. *Henderson*, 29 S.C.R. 632, affirming 25 Ont. App. 437.

X. SLEEPING CARS.

—Pullman car—Loss of baggage—Liability—Arts. 1814, 1815 C.C.]—See NEGLIGENCE, III.

XI. SUNDAY LABOUR.

—R.S.O. c. 246—Foreman of elevator working on Sunday—Grand Trunk Railway.]—See SUNDAY.

XII. TAXATION OF RAILWAY PROPERTY.

—Lease to Government—59 V., c. 15 (P.Q.).]—A railway although leased to and worked by the federal government, must pay the tax imposed upon these corporations by virtue of c. 15 of 59 V. (P.Q.). *Coté* v. *Drummond County Ry. Co.*, 15 Que. S.C. 561.

RECEIVER.

—Equitable execution—Interest under will—Interference with discretion of executors—Prohibition—Division Court.]—The mother of the judgment debtor by her will empowered her executors, if in their discretion they should see fit, to pay the income of her estate, in part or in whole, to and for his benefit and advantage, at such time and in such manner and sums as they should see fit, leaving it to their option and discretion whether they should pay him any sum. An order was made in a Division Court action, after judgment, appointing the judgment creditor receiver to receive the amount of his judgment from the executors, whenever they should exercise their discretion to pay the judgment debtor the amount of the judgment or any part thereof. Prohibition was granted against the enforcement of this order:—Held, following *The Queen* v. *Judge of County Court of Lincolnshire*, 20 Q.B.D. 167, that if the order was intended to interfere with the action of the executors, it should not have been made; and if it did not so interfere, it was nugatory. *Re McInnes* v. *McGaw*, 30 Ont. R. 38.

—Equitable execution—Administrator ad litem—Ex parte Order—Subsequent grant of administration—Advertisement for creditors.]—By an *ex parte* order of the High Court, after judgment for the plaintiff, the defendant having died, the plaintiff was appointed receiver of the interest of the defendant in an estate, another person was appointed administrator *ad litem* of the defendant's estate for the purposes of the action only, and added as a defendant, and a reference was directed for administration. Afterwards, letters of administration of the estate of the defendant were granted by a Surrogate Court to a trusts company:—Held, that the property to which the defendant was entitled at the time of his death never vested in the administrator *ad litem*, because of the limited character of the administration granted to him; but vested in the company upon the grant to them, and they were bound to administer the estate, paying the debts ratably. The company were "parties" affected by the *ex parte* order within the meaning of Rule 538, and were entitled to move to vacate it. That order was based upon the assumption that the plaintiff was the only creditor of the defendant, and that the plaintiff could not be, and no one else was likely to be, appointed administrator. The order would not have been made had it been known, as was the fact, that any other creditor existed, for the plaintiff had acquired no lien or priority, by reason of a former receiving order, obtained by him in respect of his judgment against the defendant, upon the property not come to the hands of the receiver. The referee, in proceeding under the *ex parte* order, was wrong in not issuing an advertisement for creditors; he omitted to do so because of the mistaken notion that the plaintiff was entitled to the whole estate, it being less than the amount of his judgment. *McLean* v. *Allen*, 18 Ont. Pr. 255.

—**Equitable execution — Case for — "Remedy" (N.S.) County Court Act.**]—Plaintiff recovered judgment against defendants in the County Court, and issued execution, but was unable to obtain satisfaction for want of property of defendants' upon which to levy. It appeared, however, that defendants were in possession of a lot of land with a house and barn thereon, under an agreement for purchase for the sum of $2,000, of which $100 had been paid on the signing of the agreement, and the balance was to be paid in instalments. Under the terms of the agreement the defendants were to have possession until the completion of the payments, provided that, in default of payment of any of the instalments, the vendor should have the option of cancelling the agreement and resuming possession, in which case any payments made were to be forfeited. $250 in all had been paid in accordance with the terms of the agreement:—Held, that the case was a proper one for the appointment of a receiver by way of equitable execution; Also, that the Judge of the County Court has power to appoint such a receiver; Also, that the appointment of a receiver is a "remedy" which must be given effect to when necessary under s. 22 of the County Court Act (N.S.). *Barrowman* v. *Fader*, 32 N.S.R. 284.

—**Practice — Order — R.S.B.C. c. 56, s. 14.**]—Receivership orders must be made by the Court and cannot be made by a Judge sitting in Chambers. *Wakefield* v. *Turner*, 6 B.C.R. 216.

—**Foreign appointment—Railway Co.—Ester en justice—Seizure—Foreign law.**]

See CONFLICT OF LAWS.

—**Ont. Land Titles Act—Order of Master of Titles—Receiver—Equitable execution.**]

See EQUITABLE EXECUTION.

—**Admiralty law—Ship in possession of receiver—Seizure under fi. fa. of part of equipment—Interpleader.**]—See SHIPPING, VIII.

REDDITION DE COMPTE.

—**Commercial matters—Banks—Arts. 566 et seq. C.C.P.**]—See BANKS AND BANKING.

—**Action for—Filing of account—Right of defendant to file before judgment.**]

See PRACTICE AND PROCEDURE, XLVIII.

—**Action—Account rendered—Objection to mode of objection—Exception à la forme—Art. 522 C.C.P. (Old text)—Art. 567 C.C.P.—Word "Nominativement"—Construction.**]

See ACCOUNT, PRACTICE AND PROCEDURE, XLVIII, STATUTES, II.

REGISTRATION.

—**Wife separated as to property—Registry of declaration—Registry after action—60 V., c. 49, s. 13 (P.Q.)—Art. 5502a R.S.Q.**]

See ACTION, XIX.

—**Rrgistry of donation—Failure to register.**]

See DONATION.

—**Sale of land—Vente à réméré—Validity of sale—Third party.**]—See SALE OF LAND, I.

REGISTRY LAWS.

—**Railway—Expropriation of land—Art. 1590 C.C.**]—The provisions of the Civil Code of Lower Canada respecting registration of real rights have no application to proceedings in matters of the expropriation of lands for railway purposes under the provisions of the Revised Statutes of Quebec. *Quebec, Montmorency & Charlevois Ry. Co.* v. *Gibsone*, 29 S.C.R. 340.

—**Substitution—Prescription — Bonâ fides — Presumption against purchaser.**]—As good faith is required for the ten years prescription under the Civil Code, that prescription cannot be invoked against a substitution which has been duly registered, such registration being sufficient to constitute any third party who might subsequently purchase from the institute a holder in bad faith. *Meloche* v. *Simpson*, 29 S.C.R. 375.

—**Priorities—Ante-nuptial contract — Mortgage—Copy of instrument—Defective registration—Constructive notice—57 V., c. 20, s. 69 (N.B.).**]—By an ante-nuptial contract entered into in Quebec, the intending husband endowed his future wife in a sum of money as a dower prefixed chargeable at once upon his property in New Brunswick. The contract was executed in Quebec before a notary. A copy of the contract certified to by the notary was registered in Madawaska County. Subsequently to its registration a mortgage by the husband of his real estate in Madawaska County to the plaintiff was registered in that county. The plaintiff was a purchaser for value, and had no notice of the ante-nuptial contract.—Held, that as the Registry Act, c. 74 C.S. provides only for the registration of an original instrument, except in certain cases, the copy of the marriage contract was improperly on the records, and the marriage contract was not entitled to priority over the plaintiff's mortgage.—Section 69 of the Registry Act, 57 V., c. 20, providing that the registration of any instrument under the Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration, notwithstanding any defect in the proof for registration, does not apply where the

registration is a nullity, as where the proof of the execution required by the Act is wanting. *Murchie* v. *Theriault*, 1 N.B. Eq. 588.

—N. S. Registry Act—Equitable titles—Mortgage—Trustee—Judgment against.]

See MORTGAGE, XVII.

RENT.

—Constituted rents—Arrearages—Prescription.]—Arrearages of constituted rents capitalized in a new deed are prescribed by thirty years and not by five. *City of Quebec* v. *Hamel*, 15 Que. S.C. 60.

—Immovable—Agreement for sale—Payment of price—Interest payable as rent—Lease—Saisie-gagerie.]—See LANDLORD AND TENANT, VIII.

REPLEVIN.

—Coroner acting in place of sheriff—Liability—Replevin—Bond—Insufficient bond.]—The provisions of the N. S. Judicature Act as to replevin call for a bond with two sureties:—Held, that defendant, a coroner, acting in the place of the sheriff, in a case in which the sheriff was disqualified, who accepted a bond with one surety was personally responsible, neither the plaintiff in replevin nor the surety being at the time possessed of sufficient property to respond the judgment against them on the bond; Held, that there is no distinction between the liability of a coroner acting in a case where the sheriff is an interested party and that of the sheriff, the coroner being, in such cases, at common law, *ex officio*, sheriff, so that not only all the common law, but all the statutory liabilities, as well as the rights of the office of sheriff, attach to him while acting in that capacity. *Horsfall* v. *Sutherland*, 31 N.S.R. 471.

—Action against sheriff by holder of chattel mortgage—Seizure of equity of redemption—Conversion—Unlawful detention—Continuance in possession—Advertisement of sale—Estoppel.]—Under the provisions O. 40, R. 31 (N.S.), the sheriff is authorized to seize and sell the interest or equity of redemption of the mortgagor of personal chattels. In an action brought by plaintiff, as the holder of a chattel mortgage of the goods of W. G., the trial Judge found: 1. That the mortgage was given in good faith to secure a portion of a debt owing at the time of its execution. 2. That the sheriff seized the goods themselves and not merely the interest of W. G. in them. 3. That a sufficient demand was made for the return of the goods. Per Meagher, J. (McDonald, C.J., concurring):—Held, that the sheriff could not go beyond the power contained in the rule, and that where he assumed to do more, as by seizing and selling the goods themselves, in disregard of the mortgagee's right, it was an exercise of dominion over the property amounting to a conversion, for which replevin would lie; Held, also, that replevin would lie for an unlawful detention as well as for an unlawful taking or, in other words, wherever trover will lie. Per Townshend, J. (Ritchie, J., concurring):—Held, that as none of the goods were removed by the sheriff, and no one was left in charge, and no act of any kind was done indicating a continuance of possession on the part of the sheriff, the goods remained in the possession of plaintiff, and no action for their recovery would lie; Held, also, that the right of the sheriff to seize and sell the equity of redemption of the mortgagor under O. 40, R. 31, being clear, plaintiff was not damaged by the mere advertising of the goods for sale, and no action would lie for an intention not actually carried into effect; Held, also, that the sheriff was not estopped in his defence by statements set forth in the advertisement of sale, but had the right to justify on any valid ground which existed at the time of the levy. *Quære*, if the sheriff had proceeded to sell, whether an action would lie unless something was done which destroyed plaintiff's right of possession or the goods themselves. *Gates* v. *Bent*, 31 N.S.R. 544.

—Tort—Husband and wife—Married Women's Property Act, R.S.B.C. 1897, c. 130, s. 13.]—A replevin action is an action for a tort, and therefore a husband cannot maintain it against his wife. *McGregor* v. *McGregor*, 6 B.C.R. 432.

—Replevin bond—Requirements as to sureties—Ship whether repleviable—C.S.B.C. 1888, c. 101.]

See PRACTICE AND PROCEDURE, LI.

—Practice in replevin action.]

See PRACTICE AND PROCEDURE, LI.

REPRISE D'INSTANCE.

—Petition—Inscription en droit—Costs.]

See COSTS, XV.

REQUÊTE CIVILE.

See JUDGMENT, XV.

RESILIATION.

See LANDLORD AND TENANT, XIII.

RES JUDICATA.

—Incorporated company—Action against—Consent judgment.]—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 of 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 toll 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, that the above grounds of impeachment were covered by the consent judgment and were *res judicata*. *Hardy Lumber Co.* v. *Pickerel River Improvement Co.*, 29 S.C.R. 211.

—Purchase of insolvent estate—Refusal to complete—Action by curator—Completion of purchase after judgment—Subsequent action for special damages.]—A merchant in Ottawa, Ont., purchased the assets of an insolvent trader in Hull, Que., but refused to accept delivery of the same. The curator of the estate brought an action in the Superior Court of Quebec to compel him to do so and obtained judgment whereupon he accepted delivery and paid the purchase money. The curator subsequent brought another action in Ontario for special damages alleged to have been incurred in the care and preservation of the assets from the time of the purchase until the delivery:—Held, that these special damages, most of which could not be ascertained until after the purchase was completed, could not have been included in the action brought in the Quebec Courts and the right to recover them was not *res judicata* by the judgment in that action. *Hyde* v. *Lindsay*, 29 S.C.R. 595.

—Domicile—Separation of property—Chose jugée—Damages for illegal seizure.]—The defendant had seized against the plaintiff's husband, property which she claimed as being her own in an opposition. She was described in this opposition as being separated as to property from her said husband. The opposition was not contested, except as to the costs thereof, inasmuch as the defendant had acted in good faith when seizing the property as belonging to her husband. Her opposition having been maintained, she now claimed damages for the alleged illegal seizure:—Held, that the plaintiff's husband merely resided in New Hampshire, but was not domiciled there, when they married, and consequently they now were in community of property. She therefore could not bring this action in her own name; held, further, that the judgment which had maintained her opposition wherein she was described as "a wife separated as to property" was not *chose jugée* as to her status, there having been no contestation on that point, and the *dispositif* of the judgment not deciding this question in any way whatever. *Brien dit Desrochers* v. *Marchildon*, 15 Que. S.C. 318.

—Habeas corpus—Issue by Judge of High Court—Appeal—Res judicata.]—See HABEAS CORPUS.

REVENDICATION.

—Seizure in revendication of thing in custody of guardian under writ of execution—Responsibility of guardian.]—Where an article is seized in defendant's possession under a seizure in revendication, the fact that at the time of the seizure the defendant had been appointed guardian thereof under an execution against himself in another suit, is no answer on his part to the demand in revendication, inasmuch as he might have relieved himself of any responsibility as guardian towards the creditor who issued the execution by notifying him of the seizure in revendication. *Banque d'Hochelaga* v. *McConnell*, 14 Que. S.C. 240.

—Saisie-revendication—Declaration—Irregularity—Exception à la forme—Art. 946 C.C.P.]

See PLEADING, XVI.

REVENUE.

—Customs law—Reference—The Customs Act, ss. 182, 183—Minister's decision—Appeal.]—Where a claim has been referred to the Exchequer Court under s. 182 of The Customs Act, the proceeding thereon, as regulated by the provisions of s. 183 of the Act, is not in the nature of an appeal from the decision of the Minister; and the Court has power to hear, consider and determine the matter upon the evidence adduced before it, whether the same has been before the Minister or not. *Tyrrell* v. *The Queen*, 6 Can. Ex. C.R. 169.

—Customs export bonds—Penalties—Enforcement—Law of the Province of Quebec.]—The provisions of s. 8 of 8 and 9 Wm. III., c. 11, affecting actions upon bonds, do not apply to proceedings by the Crown for the enforcement of a penalty for breach of a Customs export bond. Two Customs export bonds were entered into by warehousemen at the port of Montreal, P.Q. Upon breach of the conditions of the bonds, the Crown took action to recover the amount of the penalties fixed by such bonds:—Held, that the case must be determined by the law of the

Province of Quebec, and that under that law (Arts. 1036 and 1135) judgment should be entered for the full amount of each bond. *The Queen* v. *Finlayson*, 6 Can. Ex. C.R. 202.

—**Customs law—Breach—Importation—Fraudulent undervaluation—Manufactured cloths—Cut lengths—Trade discounts—Forfeiture.**]—Claimants were charged with a breach of *The Customs Act* by reason of fraudulent undervaluation of certain manufactured cloths imported into Canada. The goods were imported in given lengths cut to order, and not by the roll or piece as they were manufactured. The invoices on which the goods were entered for duty shewed the prices at which, in the country of production, the manufacturer sells the uncut goods to the wholesale dealer or jobber, instead of shewing the fair market value of such goods cut to order in given lengths when sold for home consumption in the principal markets of the country from which they were imported. The values shewn on the invoices were further reduced by certain alleged trade discounts, for which there was no apparent justification or excuse:—Held, that the circumstances amounted to fraudulent undervaluation; and that the decision of the Controller of Customs declaring the goods forfeited must be confirmed. [Leave to appeal to Supreme Court of Canada refused.] *Schulze* v. *The Queen*, 6 Can. Ex. C.R. 268.

—**Ont. Succession Duty Act—Forum—55 V., c. 6 (O.)—Practice—Special Case—Declaration of right.**]—When the provincial treasurer and the parties interested do not agree as to the succession duty payable, the question must be settled by the tribunal appointed by the Act, namely, the Surrogate Registrar, with the right of appeal given by the Act. The High Court has no jurisdiction to decide the question in a stated case. The Court of Appeal refused, therefore, to entertain an appeal from the judgments of Rose, J., 27 Ont. R. 380, and 28 Ont. R. 571. Questions of law which cannot properly arise in, or as incidental to an action, or other proceeding in Court, cannot be made the subject of a special case under Rule 372, in order to obtain the opinion of the Court thereon. Where a special forum is created by statute for determining rights of parties, a declaration of right will not be made by the Court under s. 57, s.s. (5) of the Judicature Act, in an action which the Court has no jurisdiction to entertain. *Attorney-General* v. *Cameron*, 26 Ont. App. 103.

—**Illicit distilling—Warrant of commitment—Costs of conveying to gaol—Habeas corpus—Inland Revenue Act.**]—Where a conviction is made under the Inland Revenue Act (Can.), and a money penalty is imposed and in default imprisonment for a fixed term unless the penalty and the costs and charges of conveying the accused to gaol are sooner paid, it is necessary that the amount of the latter costs and charges should be stated in the warrant of commitment (Inland Revenue Act, s. 113); and where not so stated the prisoner is entitled to be discharged on habeas corpus. *The Queen* v. *Corbett*, 2 Can. Cr. Cas. 499.

—**Succession duties—Non-payment.**]—The non-payment of succession duties does not prevent the heirs and executors from taking possession of the deceased's estate, the prohibition in such case being only against transfers. 55 & 56 V., c. 17; R.S.Q., Art. 1191*d*, par. 5. *Re Denoou*, 15 Que. S.C. 567.

—**Life policy—Succession duty.**]
See INSURANCE, III.

RIGHT.

—**Declaration of right—Rights of parties—Special forum.**]
See PRACTICE AND PROCEDURE, XVII.

RIPARIAN OWNER.

—**Foreshore—Title to—Seigniorial title—Grass growing below high water mark—Arts. 588, 591 C.C.—6. W. 4, c. 55—C.S.L.C. c. 28—R.S.Q. Arts. 5537, 5541—61 V., c. 40 (P.Q.)—Seigniory of Isle Verte.**]—See FORESHORE.

And see WATERS AND WATERCOURSES.

RURAL INSPECTOR.

See MUNICIPAL CORPORATIONS, XI.

SABBATH OBSERVANCE.

See SUNDAY.

SAISIE-ARRÊT.

—**Saisie-arrêt before judgment—Non-service of affidavit—Prejudice—Exception à la forme.**]—The defendant, against whom a writ of *saisie-arrêt*, before judgment has issued, has sufficient interest to complain, by way of exception to the form, that a copy of the affidavit on which it was issused was not served on him, nor left for him with the prothonotary, such non-service being of a nature to cause him prejudice. *Poitras* v. *Gagué*, 14 Que. S.C. 272.

—**Conditional loan—Legal tender—Notary as agent or mandatary—Commencement de preuve par écrit—Onus of proof.**]—G. entrusted money to the hands of F., a notary public, to the end of having a legal tender thereof made to one, Audet. The legal tender was to be made at the request and in favour of B., the plaintiff.

G. merely provided the money therefor, under the express condition that such money would be returned to him if the offer was refused. The money was seized in F.'s hands as a debt due to G:—Held, that under these circumstances, F. was G.'s agent or mandatary, to safely keep the money and to return it to him if a certain condition happened, viz., Audet's refusal. F. was B.'s mandatary to properly make the offer to Audet. The contract in this case cannot be held to be a pure and simple loan of money from G. to B., such loan not being the intention of the parties. The money was to remain G's property until accepted by Audet, and, if not accepted, should be immediately returned to G. Even if it was a loan, it was a conditional one, and until the condition happened, the contract was inoperative as a loan, and the money remained the property of the lender. A writing, which renders probable that which a litigant desires to prove, constitutes a *commencement de preuve par écrit*. In this case a receipt for money from F. to G., shewing the use F. was to make of such money (make a legal tender to a third party), afforded *primâ facie* evidence that the money belonged to G., and put on the opposite party the onus of proof that such was not the case. *Blanchet* v. *Roy*, 14 Que. S.C. 402.

—**After judgment—Salary of sheriff.**]—No portion of a sheriff's salary can be seized. *Denton* v. *Arpin*, 14 Que. S.C. 415.

—**Seizure before judgment—Contestation without cause — Demand for abandonment — Art. 931 C.C.P.**]—The plaintiff had made a demand on the defendant for abandonment, but the latter contested such demand and the contestation having been dismissed by the Superior Court she inscribed in review and was again unsuccessful. In the meantime the plaintiff, believing that defendant would get rid of her property before the judgment in review was given caused a writ of *saisie-arrêt* before judgment to be issued against her:—Held, that defendant having, without any grounds, resisted the demand for abandonment, the plaintiff, according to the provisions of Art. 931 C.C.P., which authorizes a seizure before judgment when a trader (*commercant*) who has failed in his payments refuses to abandon his property although lawfully required, was justified in taking the course which he adopted. *Renaud* v. *Hoffman*, 15 Que. S.C. 92.

—**Seizure of shares in partnership—Art. 698 C.C.P.—Declaration by garnishee.**]—Where a seizure in garnishment is made of the share of the defendant in a partnership, the declaration of the garnishee, under Art. 698 C.C.P., must disclose the share of the defendant in the stock and profits of the partnership, even where the declaration of the garnishee denies all indebtedness to the defendant; and where the declaration of the garnishee fails to give such information, the Court on motion to reject the declaration, will order the garnishee to complete his declaration by setting forth the share of the defendant in the stock and profits of the partnership. *Leet* v. *Singer*, 15 Que. S.C. 142.

—**Validity—Authorization of wife to ester en justice — Seizure after judgment.**]—Where a wife has been authorized by a Judge to *ester en justice*, such authorization has effect only until final judgment, and a *saisie-arrêt* issued subsequently is therefore unauthorized and illegal. *Emery* v. *Martel*, 15 Que. S.C. 622.

—**Seizure of wages—Arts. 599, 678, 680, 897 C.C.P.—Art. 1147 C.C.**]—After service of seizure in the hands of a *tiers-saisi*, the latter has no right to enter into any subsequent engagement with the defendant which would have the effect of prejudicing the rights of the plaintiff as regards the amount which may have been seized as due under an existing engagement. The fact that the subsequent engagement is so made by *tiers-saisi* in order to prevent defendant from leaving his service, which could have caused him considerable damage, is not to be considered in law. *Leclerc* v. *Cadieux*, 5 Rev. de Jur. 193.

—**Saisie-arrêt before judgment—Declaration of tiers-saisi—Inscription.**]—When a motion by a *tiers-saisi* for rejection of the inscription for judgment on his declaration is dismissed he cannot at the same time be condemned to pay a fixed sum to the seizing creditor (*saisissant*).—If it does not clearly appear from the declarations of the *tiers-saisi* and his answers on cross-examination that he should pay or has paid anything to the *saisi*, the seizing creditor should contest his declaration and not inscribe *de plano* for judgment against him. *Baxter* v. *Moore*, 2 Que. P.R. 12.

—**Opposition—Appointment of guardian—Art. 621 C.C.P.**]—Where a bailiff seizes movable property as belonging to the defendant, and fails to appoint a guardian to the goods so seized, the opposant who claims the property has a right to petition the Court for the appointment of a guardian to the same, and the bailiff is bound to accept such guardian, if the latter can comply with the requirements of Art. 621 C.C.P. *Genser* v. *Schwartz*, 2 Que. P.R. 29.

—**Tiers-saisi—Contesting declaration—Attorney's powers — Interest in proceedings.**]—A *tiers-saisi* has no right, in answer to a contestation of his declaration, to bring in question the authority (*mandat*) of the attorney of the *contestants*.—The *tiers-saisi* has sufficient interest to demand that the execution of the judgment on which the *saisie-arrêt* issues, and which has been assigned, be made in the name of the real creditor, and proof on the merits (*preuve avant faire droit*) will be ordered upon the allegations attacking the interest of the plaintiff in such execution. *Wilson* v. *Lemonde*, 2 Que. P.R. 156.

And see JUDGMENT.

—Seizure—Guardian—Dismissal of opposition—Ordinance of 1667, tit. 19, arts. 20, 22—Arts. 577, 596 C.C.P. (old text).]—See BAILIFF.

—Declaration of tiers-saisi—Contestation—Class of costs.]—See COSTS, XXIII (*e*).

—Saisie-arrêt after judgment—Dismissal—Costs—Art. 554 C.C.P.—Tariff Nos. 12, 44, 70.]

See COSTS, XXIII (*e*).

—Service on tiers-saisi—Contestation—Art. 682 C.C.P.]—See DEBTOR AND CREDITOR, V.

—Husband working for wife—Wages—Seizure of wages in hands of wife.]

See DEBTOR AND CREDITOR, V.

—Saisie-arrêt after judgment—Foreign company—Summons—Disclosure of what is due judgment debtor.]—See DEBTOR AND CREDITOR, IX.

—Seizure before judgment—Personal debt—Seizure called saisie—Conservatorie.]

See DEBTOR AND CREDITOR, XIII.

—Execution—Seizure—Opposition—Procès-verbal—Art. 630 C.C.P.—Second seizure—Art. 623 C.C.P.]—See EXECUTIONS, IV.

—Tiers-saisi—Appearance—Filing—Contestation of declaration—Judgment by default.]

See JUDGMENT, XII.

—Seizure of schooner—Latest equipment—Action in rem.]—See LIEN, IV.

—Saisie-arrêt after judgment—Deceased plaintiff—Motion for main-levée—Intervention—Arts. 607, 677 C.C.P.]—See PARTIES, III.

—Order affecting another cause—Notice—Condemnation of tiers-saisi—Appeal—Intervention.]

See PRACTICE AND PROCEDURE, XXXVIII.
" " " XL.

—Saisie-arrêt after judgment—Seizure in hands of defendant to action—Stay of proceedings in action—Dilatory exception—Art. 177 C.C.P.]

See PRACTICE AND PROCEDURE, LI.

—Saisie-arrêt before judgment—Defective affidavit—Amendment—Prejudice—Arts. 174, 901, 919, 931, 933, 939 C.C.P.]

See PRACTICE AND PROCEDURE, V.

—Seizure against husband—Opposition by wife separée de biens—Ownership of effects seized.]—

See PRACTICE AND PROCEDURE, XLIII.

—After judgment—Contestation—Non-indebtedness—Quashing writ—Costs.]

See PRACTICE AND PROCEDURE, IX.

—Seaman's wages—Second in command—Seizure—Assignment.]—See SHIPPING, XIII.

SAISIE-GAGERIE.

—Lessor and lessee—Saisie-gagerie par droit de suite—Intention of lessee to remove effects from leased premises.]—The landlord's privilege of *saisie-gagerie par droit de suite* against the tenant does not exist where the latter has not removed any effects garnishing the leased premises, but is only contemplating such removal. *Chassé* v. *Desmarteau*, 14 Que. S.C. 65.

—Action for rent—Seizure of movables—Opposition—Second action—Fresh seizure—Lis pendens.]—To a seizure of movables in an action for rent defendants claimed, by opposition, that they were non-seizable. Pending the proceedings a second action was brought for rent subsequently accruing:—Held, on exception by defendants, that the movables could be seized anew in the second action and placed in custody of the law to preserve plaintiffs' privilege in case they should be declared seizable in the first. *Montreal Street Railway Co.* v. *Gauthier*, 14 Que. S.C. 147.

—Landlord and tenant—Detention of tenant's effects.]—A landlord cannot detain his tenant's effects by force but must exercise his privilege by way of *saisie-gagerie*. *Catholic Order of Foresters* v. *St. Martin*, 15 Que. S.C. 30.

—Privilege for law costs—Useful seizure.]—The privilege for law costs cannot be opposed to a creditor invested with a special right and in regard to whom the costs were uselessly incurred. So, where the plaintiff issued a *saisie-gagerie* and the opposant a seizure before judgment of the same effects on the same day, but the seizure before judgment was made first, and it appeared that the goods seized were at the time in a building owned by the lessor and in his actual possession (the defendant Radford having absconded), and the amount levied was insufficient to pay the plaintiff's claim, it was held that the opposant was not entitled to a privilege for law costs, his seizure not being useful to the plaintiff. *Imperial Ins. Co.* v. *Radford*, 15 Que. S.C. 591.

—Action for rent—Seizure—Confession for stated sum—Judgment—Maintenance of seizure.]

See JUDGMENT, IV.

—Immovable—Agreement for sale—Payment of price—Interest payable as rent—Lease.]

See LANDLORD AND TENANT, VII.

SALE OF GOODS.

I. Auction.

—Invoice sent with goods—Price.]—When goods are sent to an auctioneer, without a price limit, the fact that they are accompanied by an invoice is not understood to mean that the goods shall not be sold at less than the prices therein set forth. The business of auctioneers, when selling movable effects, is to knock them down to the last and highest bidder, and, in the absence of special instructions to the contrary, they are entitled to do so, and are not liable for more than the prices so obtained. *Nelson* v. *Hicks*, 15 Que. S.C. 465.

II. Change of Title.

—Contract—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 and 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 the stock of the business were not sold to W. and wife but 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.* v. *Hatfield*, 29 S.C.R. 95.

III. Completion of Sale.

—Sale of lumber—Delivery—Marking—Detention for payment.]—Under a contract for sale the buyer only becomes the real owner of the thing sold on payment of the price, provided no term has been fixed for such payment. In this case the purchasers (petitioners), even after having marked the lumber sold with their name, could only effectually claim it as against the curator of the insolvent vendor after tendering the price and, upon a refusal to accept it, having deposited the amount in Court. Payment under the contract having to be made at the time of delivery, that is to say, when the deals had been "properly piled at the station before being shipped" the curator had a right to retain them on the insolvent's account as a guarantee for payment for his goods. *In re Ahearn*, 15 Que. S.C. 131.

IV. Contract of Sale.

—Exchange of goods—Rules applicable thereto—When contract completed—Right of revendication.]—The contract of exchange of goods, being governed by the rules concerning sale, is complete by the consent alone of the parties thereto at the time of the appropriation to the contract of the specific goods exchanged, even though delivery has not taken place.—Where appellant, in Montreal, agreed to exchange goods with respondents in Liverpool, and appellant shipped his goods on board the cars at Montreal according to the agreement, his goods were then appropriated to the contract, and having executed his part of the agreement, he was entitled to the delivery of respondents' goods, which, similarly, were appropriated to the contract when shipped on board the vessel at Liverpool, on appellant's account and at his risk. The property of the goods then passed to the appellant, and he was entitled to revendicate them on their arrival in Montreal. Although the bills of lading were made one to the shippers' order and the other to the order of their agent in Montreal, it did not appear that this was intended to prevent the property in the goods from passing to the purchaser. *Vipond* v. *Kitterick*, 8 Que. Q.B. 11.

—Sale of engine and boiler—Representations as to condition.]—In an action brought by plaintiffs claiming the return of a sum of money paid to defendants as the price of an engine and boiler, and damages for alleged false and fraudulent representations as to the character and capacity of the engine and boiler, the jury found in plaintiff's favour on all the issues raised. It appeard that the first complaint as to the insufficiency of the boiler was made five months after it was first used, and that neither the defendants, nor any person on their behalf, categorically used, or agreed to, terms warranting each and all of the qualities and capacities of the engine and boiler as alleged, but that, during a conversation as to the character of the engine and boiler, and the purposes for which they were required, preliminary to the purchase, the question was asked whether they (defendants), would warrant them, and the answer was made that they would:—Held, setting aside the findings of the jury and ordering a new trial, that these words would only mean that the engine and boiler were good and sound, and reasonably fit for the purposes of an engine and boiler of the character and power stated, and not that

defendants would warrant them to operate mills that they had never seen. There was evidence that, after some negotiation, defendants agreed to let plaintiffs have the engine and boiler for a smaller amount than the price at first demanded, and to give a written guarantee for the term of one year; Held, that, the case being one in which the evidence was conflicting, it was improbable that one undertaking collateral to the contract (the least important), would be reduced to writing and the other not, and that, in relation to the weight to be attached to the evidence, the giving of the written guarantee was a fact of the highest importance; Held, also, that if the statement relied on by plaintiffs did not amount to a warranty, they must be regarded as mere expressions of opinion. *Higgins* v. *Clish*, 31 N.S.R. 451.

—Agreement—Option—Exercise of option by one party without objection by other.]—A definite agreement having been arrived at, with an option as to how it was to be performed:—Held, that as soon as one of the parties acted on one of the alternatives, and the other, without objection, adopted it, the option was at an end, and all the terms complete. *Sumner* v. *Thompson*, 31 N.S.R. 481.

— Statute of Limitations — Acknowledgment— Consideration—Sale of goods—Rescission.]—The defendant on 24th March, 1888, gave an order for a binder, and agreed to pay $150 for it, giving two promissory notes of $75 each, the last of which fell due on 1st January, 1891. It was provided both in the order and in the notes that the property in the machine was not to pass to the defendant until payment of the price in full, and that on default in payment of either note the vendor should have the right to take possession of and sell the machine, the notes providing as follows: "The proceeds thereof to be applied on the amount unpaid of the purchase price." On default in payment of the first note the vendor re-took the machine, sold it, and realized about enough to pay the first note. The notes were afterwards indorsed to the plaintiffs, and in 1893 they employed an agent to collect the amount of both. The agent wrote defendant a letter demanding payment, to which the defendant wrote in reply that the vendors had sold the machine for $70 or $75 before the notes came due, and continued: "I cannot see that I owe the firm for anything but the last note and interest on it." Plaintiffs entered suit on the last note in 1898:—Held (1), that the action of the vendors in re-taking the machine and selling it did not, under the terms of the agreement, operate as a rescission of the contract, and that there was no failure of consideration for the note sued on; (2), that the acknowledgment contained in defendant's letter to the collection agent warranted the inference of a promise to pay and was sufficient, under 9 Geo. IV., c. 14, to take the case out of the Statute of Limitations, although it was made to an agent of the plaintiffs and not to the original creditors: *Stamford Banking Co.* v. *Smith* [1892], 1 Q.B. 765; *Green* v. *Humphreys*, 26 Ch. D. 474; and *Tanner* v. *Smart*, 6 B. & C. 603, followed. *Watson* v. *Sample*, 12 Man. R. 373.

V. Delivery.

—Breach of contract—Damages.]—In an action of damages for failure to deliver goods at the time specified in the contract, a claim for the difference between the purchase prices of the goods, and the prices at which they were selling at the time when they should have been delivered, is not too remote. *Marsh* v. *Leggat*, 8 Que. Q.B. 221, affirmed by Supreme Court, 5th June, 1899.

—Option as to place of delivery—Usage of trade.]—After negotiations by telephone in reference to the sale of a quantity of oats, plaintiff wrote defendants as follows:—"I confirm sale to you by telephone of 10,000 bushels of Island black oats, at 24½ cents per bushel f.o.b. cars at Pictou, or 28 cents delivered at Elmsdale, whichever way you may prefer to order them forward, the oats to be bagged in your bags. If you intend having them go to different stations kindly give me instructions as early as possible." To this letter defendants replied as follows: "Yours of the 7th inst. to hand and we now complete purchase, and will forward the bags to you at once for the oats, when we hope to be able to instruct you as to where to ship the same." At the trial it was agreed that it was the usage of the trade, if oats were to be delivered at a certain point on the railway, at a certain price, with an option to the buyer to direct delivery at points either this side or beyond the place of delivery, that the freight should be either added or deducted as the case might be. Defendants, through their agents, ordered cars containing oats to different stations on the railway, from time to time. Plaintiff complied with the orders pre-paying the freight on each car to the place of destination, and sending invoices with a notification that the freight had been pre-paid. A large part of the oats was received in this way, without objections by defendants or their agent. Plaintiff having, in all his dealings with defendants, treated the delivery at Elmsdale as the one adopted by defendants: Held, that defendants were bound. *Sumner* v. *Thompson*, 31 N.S.R. 481.

—Future delivery of goods—Appropriation—Conversion by sheriff seizing under execution—Title—Special right of property.]—Plaintiff and P. entered into an agreement in writing whereby plaintiff agreed to purchase, and P. agreed to sell, all the deals that P. should cut and manufacture during 1897. Under the terms of the contract the deals were to be cut to certain dimensions, and were to be hauled out and ready to be delivered on board the cars at Thompson Station about the last of July, 1897. The deals were manufactured according to the contract, and

were hauled out and piled alongside the railway siding ready to be loaded on board the cars. A large quantity of the deals delivered at the siding were placed upon the cars by plaintiff with the assent of P., and were sent to Halifax for shipment, and some days after the last of the deals were brought out and deposited at the station, P. was present and went over and checked the quantity of deals with plaintiff. Subsequent to the making of the contract, and prior to the delivery of the deals, plaintiff made advances to P., on account of the contract, to the amount of about $500, and after the delivery of the deals was commenced, he paid several further sums amounting to nearly if not the whole amount to which P. was entitled under the contract. The balance of deals remained at the station, having been levied upon by the defendant sheriff, under an execution and absent or absconding debtor process against P.—Held, allowing plaintiff's appeal with costs, that there was an irrevocable appropriation of the deals under which plaintiff became possessed of the right to receive and to have them under the contract, and was vested with a special right of property in them, which was destroyed or interfered with by the seizure and sale by defendant, and that defendant was guilty of a conversion.—Held, also, that after the delivery of the deals at the railway siding, the Court would have restrained P. from diverting them to any purpose foreign to the contract, and that the mere fact that the complete legal title had not passed, would not give an execution creditor a right which P. himself could not claim to exercise. *Johnson* v. *Logan*, 32 N.S.R. 28.

VI. Exchange.

—Rules applicable—When contract completed—Right of revendication.] — The contract of exchange of goods, being governed by the rules concerning sale, is complete by the consent alone of the parties thereto at the time of the appropriation to the contract of the specific goods exchanged, even though delivery has not taken place. — Where appellant, in Montreal, agreed to exchange goods with respondents in Liverpool, and appellant shipped his goods on board the cars at Montreal according to the agreement, his goods were then appropriated to the contract, and having executed his part of the agreement, he was entitled to the delivery of respondent's goods, which, similarly, were appropriated to the contract when shipped on board the vessel at Liverpool on appellant's account and at his risk. The property of the goods then passed to the appellant, and he was entitled to revendicate them on their arrival in Montreal. Although the bills of lading were made one to the shippers' order and the other to the order of their agent in Montreal, it did not appear that this was intended to prevent the property in the goods from passing to the purchaser. *Vipond* v. *McKitterick*, 8 Que. Q.B. 11.

VII. Joint Venture.

—Incidental demand — Accounting.]—When a defendant is sued by the assignee of a party with whom he had engaged in a joint venture for the sale of certain machines, he may by incidental demand ask that the plaintiff be condemned to render him an account of such joint venture, where all the parties to said joint venture are in the record, and where both demands are closely connected and will be easily established by the same *enquête* and trial. *Carter* v. *Reilly*, 2 Que. P.R. 55.

VIII. Sale en bloc.

—Sale en bloc of stock-in-trade—Alleged deficiency—Absence of intention to deceive—Complaint — Reasonable time.] — The plaintiff purchased a stock-in-trade *en bloc* as it stood, without warranty that any particular quantity of goods was comprised therein. There were in the shop certain pails of candies and boxes of cigars, arranged for show purposes, which only contained candies and cigars at the top:—Held, that the purchaser, having been expressly invited to examine the stock and satisfy himself as to what was there, and he having bought on the 26th November, 1897, and brought his action only in February, 1898, after he had sold all the stock, was too late to complain of a deficiency in the stock purchased. *Sarateni* v. *Péan*, 15 Que. S.C. 202.

IX. Security for Advances.

—Banking Act—Discount of negotiable paper—Transfer to bank of price of goods shipped.]—The Adams Shoe Company shipped goods to a Toronto house. Drafts were drawn for the price of such goods and discounted by the Merchants' Bank. As security for these advances, not only the title to the drafts was transferred to the bank, but also the claim against the Toronto house for the price of the goods shipped and whose value the drafts represented:—Held, that there is no prohibition in the Banking Act against taking as security, for advances made by the bank, the transfer of a certain debt, and the same is permitted. Consequently the transactions above mentioned were valid and within the legal powers of the bank. *Merchants Bank* v. *Darveau*, 15 Que. S.C. 325.

X. Unpaid Vendor.

—Insolvency—Privilege—Time within which it must be exercised—Arts. 1998, 2000 C.C.]—Where one disposition of law is in general terms, and another states a particular rule for a special case, then, irrespective of the relative order in which the dispositions are enacted, the particular enactment derogates from the general. Applying this principle to the interpretation of Arts. 1998 and 2000 C.C., the second paragraph of Art. 1998 is to be read as creating an exception to the general rule regulating the effect of the ven-

dor's privilege as laid down in Art. 2000 C.C., in so far as the latter article permits the exercise of the vendor's privilege after the expiration of the delay fixed for revendication,—and, in the special case of insolvency, such privilege must be exercised within thirty days after delivery of the goods sold. *Re Renaud & Bradshaw*, 14 Que. S.C. 452.

XI. Warranty.

—Sale of machine—Contemplated profits from use of.]—The defendant company in 1893 sold a hay press to their co-defendant upon credit, and upon the terms that the property should remain in them until payment. The contract was properly filed under s. 6 of 51 V., c. 19, now s. 3, R.S.O. c. 149. A few months afterwards the purchaser resold the press to the plaintiff, who had no knowledge of the facts, and was told that it was paid for and free from any lien. The defendant company seized it in the plaintiff's possession under the terms of their contract:—Held, that the plaintiff was entitled to recover from his vendor, upon a warranty of title which he proved, the value of the press and the sum he would have received beyond expenses upon contracts actually made to press hay with the press in question, and which he was in course of executing at the time of the seizure, the use of the press in that way having been in the contemplation of the plaintiff's vendor at the time of the sale. *Sheard* v. *Horan*, 30 Ont. R. 618.

—Latent defects—Resiliation—Arts. 1524, 1528 C.C.]—When an article is sold with a guarantee as to certain qualities and after delivery it is established that it has not all the qualities on which the buyer relied and that the want of them was due to a defect existing before the sale, though the seller was not aware of the defect, if the buyer could not have discovered it at the time, the sale will be resiliated. *Savard* v. *Plante*, 15 Que. S.C. 623.

And see Bills of Sale and Chattel Mortgages.

SALE OF LAND.

I. Contract of Sale.

—Vente à réméré—Conditions—Registry.]—B. sold an immovable to the *auteur* of the *opposante* stipulating for a right of redemption (*faculté de réméré*) for six years on repayment of the price of sale, interest, costs and lawful charges, it being agreed that the vendor should keep the buildings up to the amount necessary to redeem and assign the policies to the purchaser, and that until repayment he should be liable, during the term of six years, for statute labour and servitude affecting the property, and would pay the municipal and school rates and assessments:—Held, that this contract constituted a sale with right of redemption (*vente à réméré*) valid as between the parties and, by reason of the registration, valid as against third parties, that at all events, it could not be attacked by a third party claiming to be a creditor of B. and alleging that the latter had no property except this immovable if such third party knew of the contract for more than a year before the sale. *Lamontagne* v. *Bédard*, 14 Que. S.C. 442.

—Writing sous seing privé—False representations—Affidavit—Art. 1223 C.C.—Art. 145 C.C.P. (old text)—Tender of deed—Conditions.]—Where a demand is based on a writing *sous seing privé* and the defendant pleads, admitting his signature, but adding that he was induced to sign the writing by false representations on the part of the plaintiff's agent as to the contents of the document signed, an affidavit by the defendant under Art. 145 C.C.P. (old text) is not necessary, and parol evidence is admissible in support of the plea.—Where a vendor of real property tenders a deed to the purchaser for signature, containing conditions which did not form part of the agreement of sale, and to which defendant never consented, the tender is null and of no effect. *Péloquin* v. *Genser*, 14 Que. S.C. 538, reversing 12 S.C. 229, C.A. Dig. (1898) 347.

—Agreement for sale—Lis pendens—Cancellation of—R.S.B.C. c. 111, s. 85.]—An order will not be made cancelling a *lis pendens* under s. 85 of the Land Registry Act in a case where damages would not be a complete compensation. *Towne* v. *Brighouse*, 6 B.C.R. 225.

—Deed of sale—Delay by purchaser in execution — Cancellation by vendor — Acquiescence — Laches.]—See Contract, II.

— Parol agreement — Specific performance — Equity—Jurisdiction—Conflict of evidence.]

See Contract, XII (*c*).

—Payment of purchase money—Interest payable as rent—Lease.]

See Landlord and Tenant, VII.

II. Gifts inter vivos.

—Acceptance on behalf of minors—Opposition à fin d'annuler.]—A person, not insolvent, may lawfully make a gift to his child, and that gift may lawfully take the form of a deed of sale to such child, in purchasing for and on behalf of the child. But in order to make the child proprietor of the property given, there must be a lawful acceptance of the gift by or on behalf of the child. *Turgeon* v. *Guay*, 15 Que. S.C. 332.

III. Judicial Sale.

—Sale "en justice"—Construction of contract—Mortgage—Special agreement.]—The creditor (contestant), under the terms of a deed of obligation and mortgage, was to be entitled to receive 10 per cent. on his capital, as liquidated damages in the event of the property hypothecated to him as security for a loan, being sold *en justice*, or dealt with in any way which might oblige him to receive his capital otherwise than as stipulated in the obligation. There was a mortgage prior to that of contestant, and it was stipulated in contestant's mortgage that, if the first mortgage were paid off, contestant's claim might be paid off at the same time. The borrower having become insolvent, the property hypothecated passed into the hands of a curator, and was by him sold at public auction, subject to the mortgages, under an authorization granted by a Judge, and with the consent of the mortgagees. The purchaser subsequently arranged with the curator to pay off the first mortgage, and, under the above-mentioned condition of the contestant's deed of obligation, the curator was at liberty to pay off the latter's claim at the same time. The contestant refused to accept the amount, unless he were also paid the 10 per cent. indemnity:—Held, that the sale was not a sale *en justice* within the meaning of the clause in the contestant's mortgage, and that the contestant was not entitled to the indemnity under the terms of the stipulation in the deed. *Re Nelson*, 15 Que. S.C. 368.

—Judicial tax—Building and jury fund—Class—Collocations.]—See Building and Jury Fund.

—Community—Hypothec on immovable—Dissolution—Action against husband—Opposition—Nullity of decree.]

See Husband and Wife, IV.

IV. Licitation.

—Licitation judiciaire—Collocation—Improvements and repairs—Right to retain possession—Arts. 1529, 1993, 2009, 2081.]—One of the owners of an immovable has not the right to be collocated, in preference to his co-owner, upon the part due him of the price of sale *par licitation judiciaire* of this property by reason of a claim for improvements and repairs thereon.—The means which the law provides for the maker of such improvements is the right of detention. Such owner, in order to preserve his privilege as possessor of the property should have caused his claim to be inscribed on the list of charges as otherwise he would be foreclosed. The *auteur* of the appellant (one of the owners) should have made good his recourse for his expenses before judgment in the cause in which he was defendant and in which the respondent (co-owner) had been declared owner of one-fifth of the price. *Crédit Foncier* v. *Loranger*, 8 Que. Q.B. 193, affirming 13 Que. S.C. 353.

V. Mistake.

—Reservation of minerals—Unilateral mistake—Principal and agent—Ratification.]—An agreement for a sale of lands containing no reservation of the minerals thereunder, issued by the land agent of a railway company to an intending purchaser, accompanied by a deposit does not bind the company to convey the minerals if the agent had instructions to reserve them, on the ground that there was a unilateral mistake against which the Court will relieve. *Hobbs* v. *Esquimalt and Nanaimo Ry. Co.*, 6 B.C.R. 228.

VI. Precarious Title.

—Sale pending action against title—Danger of eviction.]—One who has acquired the title to an immovable when an *action paulienne* was pending to annul the title of the vendor's *auteur*, whose title was also subsequent to the institution of the action which eventually succeeded, can claim, as against his vendor, the annulment of the sale, and repayment of the purchase money and attendant expenses, on the ground of the danger of eviction to which he is exposed by the title of his vendor's *auteur* being annulled. *Laramée* v. *Collier*, 14 Que. S.C. 416.

VII. Recovery of Price.

—Emancipated minor—Action immobilière—Sale during minority—Immovable by operation of law—Arts. 320, 382 C.C.]—See Infant, I.

VIII. Redemption.

—Municipal councillor—Qualification—Vente à réméré—Quo warranto—Resolutory condition—Arts. 1079, 1546 C.C.—Art. 283 M.C.]

See Municipal Corporations, VI,

IX. Rescission.

—Innocent misrepresentation—Common error—Failure of consideration.]—An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation. But where, by error of both parties, and without fraud or deceit, there has been a complete failure of consideration, a Court of Equity will rescind the contract and compel the vendor to return the pur-

chase money. Thus where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims, whereby the purchaser got nothing for his money, the contract was rescinded, though the vendor acted in good faith and the transaction was free from fraud. *Cole* v. *Pope*, 29 S.C.R. 291, affirming 6 B.C.R. 205.

X. Reservations.

—Sale of house—Habitation of part reserved.]—The right to inhabit the first story of a house, reserved by the vendor in a deed of sale, comprises not only the personal occupation, but also access to the cellar, use of wells in the yard and to water-closets, constructed by the owner to replace those formerly existing. Improvements made by the purchaser to the first story, so reserved, cannot be removed by him, but become incorporated with the house. *Talbot* v. *Martineau*, 14 Que. S.C. 273.

XI. Sale by Agent.

—Principal and agent—Authority to sell real estate—Deviation from instructions of principal.]—M. held a power of attorney from the defendant, but this did not authorize him to sell defendant's real estate. He was, however, instructed by defendant's solicitor to divide the property into lots and sell at the best prices he could get. M. then wrote for a power of attorney to sell, to which defendant's solicitor replied that defendant was then absent. Before receiving a power of attorney, M. sold the property *en bloc* to plaintiff, part of the price only to be paid in cash, and a commission of 10 per cent. to go to an intermediary. Defendant refused to complete the sale:—Held, that even if the instructions given to M. by defendant's solicitor constituted M. an agent for the sale of the property, the fact that M. had not complied with the request to divide the land into lots, and had given time for part of the price, and agreed to pay a commission of 10 per cent., justified the defendant in refusing to complete the sale. *Amyot* v. *Daulnais*, 15 Que. S.C. 311.

XII. Sale Subject to Charge.

—Sale or pledge—Vente à réméré.]—A sale of land subject to the right of redemption (*vente à réméré*), transfers the title in the lands to the purchaser in the same manner as a simple contract of sale. *Salvas* v. *Vassal*, 27 S.C.R. 68, referred to. *The Queen* v. *Montminy*, 29 S.C.R. 484.

—Eventual usufruct—Sheriff's deed—Declaration of existing usufruct—Acceptance—Seizure.]—F. H. on her marriage with C. had stipulated for a *usufruct* upon his property in case she should survive him, the said *usufruct* dating from her husband's death, and two immovables of the husband, hypothecated to this right of *usufruct*, having been seized in legal proceedings, H., by an opposition, demanded that they be sold subject to the charge of her eventual *usufruct*, which opposition was maintained. The immovables were offered for sale subject to the *usufruct* stipulated for in favour of H. in her marriage contract and L. became the purchaser. However, by the title granted to him by the sheriff it was declared that the immovables were sold subject to a *usufruct* actual and existing in favour of H. instead of an eventual *usufruct*, but H. never accepted such *usufruct* and allowed L. to have undisturbed possession of the immovables. G. *et al.*, creditors of H., and professing to exercise her rights seized in the possession of L. the value of the occupation of the immovables, claiming that the *usufruct* appertained to their debtor:—Held, that a creditor can lawfully seize debts due to his debtor, but has no right to seize a debt that may be but has not yet been acquired, and that he could not accept for him a stipulation in favour of his debtor which the latter has not himself accepted. *Leroux* v. *Greenshields*, 8 Que. Q.B. 187, reversing 12 Que. S.C. 513 *sub nom. Greenshields* v. *Hope*.

XIII. Sheriff's Sale.

—Substitution—Seizure and sale—Sheriff's deed—Description of parties—Limitation of estate—Discharge of incumbrances.]—Where a mortgage on lands *grevé de substitution* had been judicially authorized, and was given special preference by statute superior to any rights or interests that might arise under a substitution, a sale by the sheriff, in execution of the judgment so recovered, discharged the land 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 lands. The sheriff seized and sold lands under execution against a defendant described in the writ of execution, process of seizure and in the deed 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. *Vadeboncœur* v. *City of Montreal*, 29 S.C.R. 9.

—Vacating sale—Refund of price paid—Exposure to eviction—Substitution non ouvert—Prior incumbrance.]—The provisions of Art. 714 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 so 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.—The procedure by petition provided by the Code of Civil Procedure for the vacating of sheriff's sales can only be invoked in cases where an action would lie. *Trust and Loan Co.* v. *Quintal*, 2

Dor. Q.B. 190, followed.—Mere exposure to eviction is not a sufficient ground for vacating a sheriff's sale. 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 deed creating a substitution, discharges the land 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*, 29 S.C.R. 274.

—Sale subject to usufruct—Right of creditor—Report of distribution—Arts. 135, 797, 815, 816, 817 C.C.P.—Arts. 479, 480 C.C.]—An usufruct for life is not terminated by law, merely because the real estate subject to it has been allowed to be sold by sheriff on claim for taxes, which the usufructuary should have paid. Although such neglect might be a cause for which a Court might pronounce its extinction, it still subsists upon the proceeds of sale unless right of the usufructuary is contested by the owner and its extinction is demanded.—In a cause, where the right of the usufructuary is not attacked by the owner, the proceeds of the sale will be collocated by the owner, but payable to the usufructuary on his giving security for its return on the termination of his usufruct.—The creditor executing the writ and bringing about the sale against the usufructuary has the right to be subrogated for anything coming to the usufructuary out of the proceeds of the sale, without the necessity of filing an opposition *en sousordre*. —Contestation of a report of distribution is of the nature of a demurrer, and practically a revision of the prothonotary's report, and should be inscribed only for hearing; proof of any kind being inadmissible other than that which the record contained, when the report was drafted. *Township of Ascot* v. *Early*, 5 Rev. de Jur. 7.

—Sale of land under judgment—Order for—Man. Q.B. Act 1895.]—See PLEADING, XVI.

XIV. VALIDITY.

—Contract of vente à réméré by judgment debtor—Inability to satisfy judgment—Fraud—Opposition—Nullity—Presumption.]

See CONTRACT, XVIII.

XV. VENDOR AND PURCHASER.

—Sale of mortgaged land for taxes—Purchase by mortgagor—Action to foreclose—Pleading.]—Lands under mortgage were offered for sale by the municipality for arrears of taxes and purchased by the wife of the mortgagor. The tax sale certificate was afterwards assigned to L., who obtained a deed from the municipality. In an action against the mortgagor, his wife and L. for foreclosure the mortgagee alleged that the purchase of the tax sale was in pursuance of a fraudulent scheme by the mortgagors to obtain the land freed from the mortgage, and the trial Judge so held in giving judgment for the mortgagee. The Court of Queen's Bench did not pronounce on the question of fraud but affirmed the judgment on other grounds:—Held, that L. could not claim to have been a purchaser for value without notice as such defence was not pleaded, and it was not a case in which leave to amend should be granted; Held, further, that the facts proved on the trial were sufficient to put L. on inquiry and so amounted to constructive notice. *Lawlor* v. *Day*, 29 S.C.R. 441, affirming *Day* v. *Rutledge*, 12 Man. R. 290.

—Purchase by instalments—Investigation of title during term of credit—Waiver.]—On a purchase of land, the balance of the purchase price for which is payable by instalments, the purchaser may require his vendor to shew a good title before parting with the first instalment. A *lis pendens* registered against real estate is a cloud upon the title and as such, a purchaser is entitled to have it removed from the Registry. The mere fact that the purchaser made some improvements on the property does not constitute a waiver of his right of an inquiry as to title. *Towend* v. *Graham*, 6 B.C.R. 539.

And see DEED.

SCHOOLS.

—High schools—Pupils from adjacent municipality—"Municipal council"—Mandamus.]—Under its Act of Incorporation, 47 V., c. 57 (O.), the Town of Port Arthur has the same rights and powers in regard to the organization and maintenance of high schools as other incorporated towns. A Board of Trustees of a high school may be appointed by resolution of the municipal council having jurisdiction; a by-law is not necessary. The opinion bearing on this point expressed in *Township of Pembroke* v. *Canada Central R. W. Co.*, 3 Ont. R. 503, at p. 508, preferred to that in *Dawson* v. *Town of Sault Ste. Marie*, 18 Ont. R. 556. By 60 V., c. 14, s. 73 (Ont.), it is enacted that "the municipal council . . . shall pay for the maintenance of pupils . . . :"—Held, that the municipal corporation and not the individual members of the council are liable. Judgment of Falconbridge, J., ordering the Town of Fort William to pay to the Port Arthur High School Board a proportion of the cost of maintenance of the high school in respect of pupils residing in the town attending the high school affirmed, but that part thereof directing a mandamus to the mayor and councillors of the town to pass a resolution to the treasurer to pay the amount struck out as unnecessary. *Port Arthur High School Board* v. *Town of Fort William*, 25 Ont. App. 522.

—Public Schools—Union school section—Alteration of boundaries—Five years' limit—R.S.O.

c. 292, ss. 38, 43, 44.]—In 1897 a township council passed a by-law altering the boundaries of an existing school section, and this was affirmed by the county council on appeal. In 1898 the county council, on appeal from the refusal of the township council to do so, appointed arbitrators to consider the advisability of forming a union school section from parts of the section in question and of another section, and an award was made setting apart the new union school section, and thereby making material alterations in the boundaries of the existing section:—Held, that although the by-law of 1898 was passed under ss. 43 and 44 of the Public Schools Act, R.S.O. c. 292, it came within the prohibition of s. 38, s.s. 3, which required that the by-law of 1897 should remain in force for five years; and therefore the by-law of 1898 was quashed and the award set aside. *Re Amaranth and County of Dufferin*, 30 Ont. R. 43.

— **School rates — Dissident.** — A notice by a Catholic to the effect that he intends "to become dissident" will not relieve him from payment of school rates as a Catholic if by such notice he does not declare that he no longer adheres to the Catholic religion. *School Commissioners of Portneuf* v. *Marcotte*, 5 Rev. de Jur. 123.

—**N.S. Public Instruction Act, 1895—Powers of Trustees selecting site for schoolhouses—Recovery of assessments for school purposes.**]—In an action for damages for trespass for taking plaintiff's horse, defendants justified as trustees of School Section No. 40 in the County of Lunenburg, the horse having been taken under a distress warrant issued to recover the amount due by plaintiff for an assessment for school purposes. At the annual meeting in September, 1892, a resolution was passed voting the sum of $200 "towards the building of a schoolhouse," and at the annual meeting in June, 1896, a resolution was passed that $100 be added to the $200 previously voted. These sums became a charge upon the real and personal property of the school section, and the warrant issued was for the recovery of the proportion due by plaintiff and others. The trustees selected a site for the proposed building, but plaintiff relied in part upon a resolution of ratepayers passed at a meeting called for that purpose, by which it was resolved that the new schoolhouse should be erected on the site of the former building.—Held, that the terms of the first two resolutions were sufficiently comprehensive to include payment of the price of a site for the building.—That under the terms of the Acts of 1895, c. 1, s. 24, the choice of the site for the school building was vested in the trustees, subject to the sanction of the Inspector.—That it was competent for the trustees to give notice of the time for the holding of the annual meeting, without first filling a vacancy in their number caused by the removal of one of the trustees from the district, and that their action was not invalidated by the fact that the trustee who had so removed was not notified and did not sign the notice.—That there was a presumption in favour of the required number of notices having been posted up, and that such presumption was not rebutted by evidence of plaintiff to the effect that he had omitted to post up a notice which was given to him for that purpose.—That s. 28 s.s. 3 of the above Act, which provides that, for the purposes of the assessment, the trustees are to obtain the valuations of the property of the inhabitants of the district from the Municipal Clerk, is directory only, and that the assessment was not invalidated by the fact that a copy of the valuation was procured from another official. — That the assessment was not vitiated by the accidental omission of assessable property therefrom. *Meisner* v. *Meisner*, 32 N.S.R. 320.

—**N.B. Common Schools Act — Mandamus to compel trustees to allow children to attend.**]—A., owning and working a farm in School District No. 10, moved his family to District No. 8, and took up his residence there, although occasionally spending a part of his time at the farm. The trustees of District No. 8 refused to allow his children to attend school, although the applicant had notified them of his change of residence, and had asked to be assessed for school purposes.—Held, that a mandamus should issue to compel the trustees to allow his children to attend school. *Ex parte Miller*, 34 N.B.R. 318.

—**Election of school trustees—Wards—Returning officer—Nomination papers—R.S.O. c. 292, s. 60.**]—A complaint respecting the validity of mode of conducting the election of public school trustees in the town of Cobourg on the 26th December, 1898. The Municipal Amendment Act, 1898 (61 V., c. 23) which abolishes ward representation in municipal councils of towns under 5,000 inhabitants, does not affect the procedure for election of school trustees in which the system of election by ballot prevails under the provisions of s. 58 R.S.O. c. 292, and public school trustees are to be elected, as heretofore, by wards, and not by "a general vote." The powers and duties of a returning officer are purely ministerial and in no sense judicial. R.S.O., c. 23, s. 128, s.s. 2, does not restrict the returning officer to one hour for receiving nomination papers, but provides for at least one hour being allowed therefor. Sufficiency of nomination paper under s.s. 1, s. 128, R.S.O. c. 223 considered. *Reg. ex rel. Corbett* v. *Jull*, 5 Ont. Pr. 41, approved. *In re complaint under the Public Schools Act*, 35 C.L.J. 426.

—**School commissioners—Resolution of board—Signature of president—Damages from resolution—Liability of president.**]—See ACTION, XXI.

—**Commissioner—Contesting election—Quo warranto—Objections how met—Jurisdiction—Art. 987 C.C.P.—Art. 2015 R.S.Q.**]

See JURISDICTION.
" PRACTICE AND PROCEDURE, L.

—By-law altering school sections—Township and county councils.]

See MUNICIPAL CORPORATIONS, III (*g*).

SEDUCTION.

— Reparation — Pension alimentaire.] — The obligation of a seducer to provide an allowance (*pension alimentaire*) for the seduced girl or those who had charge of her, or otherwise to see to her maintenance is an obligation having a fair ground in the reparation for the injury he has caused. *Petit* v. *Martin*, 14 Que. S.C. 128.

—Girl between 14 and 16 years old—Evidence—Corroboration.]—See CRIMINAL LAW, VII (*c*).

SEIGNIORY.

—Foreshore—Title of seigneur—Grass below high water mark—Arts. 588, 591 C.C.]

See FORESHORE.

SEQUESTRATOR.

—Testamentary executor—Insolvency—Incapacity — Misconduct — Removal — Appointment of sequestrator.]

See EXECUTORS AND ADMINISTRATORS, VI.

SERVITUDE.

— Municipal corporation — Expropriation proceedings — Abandonment of proceedings.] — Where, under authority of a statute authorizing the extension of a street, a servitude for public utility was established on private land which was not expropriated and the extension was subsequently abandoned, the owner of the land was not, in the absence of any statutory authority therefor, entitled to damages for loss of proprietary rights while the servitude existed. *Perrault* v. *Gauthier*, 28 S.C.R. 241, referred to. *Hollester* v. *City of Montreal*, 29 S.C.R. 402.

—Drainage works—Burden on land—Permanent charge.]—The *procès-verbal* imposing upon land the burden of works for a water supply creates upon this land a permanent charge, which has the character of a servitude. *Barrette* v. *Corporation of St. Barthélemy*, 4 Que. Q.B. 92, followed. *McCann* v. *Township of Hinchinbrooke*, 8 Que. Q.B. 149.

—Watercourse—Contribution to works—Use of higher lands.]—A corporation is not authorized by law to compel all the proprietors of higher lands, who bring water thereon, to contribute to the works of a watercourse, but only those who are interested in the watercourse, and who derive benefit therefrom.—The proprietor of the upper lands does not aggravate the servitude of the lower lands when he digs ditches in his own land, for the purposes of cultivation, to carry the water to the place where it is to be discharged to the best advantage for the cultivation of his lands. *Comtois* v. *Dumontier*, 8 Que. Q.B. 293.

—Division wall—Fence wall—Art. 520 C.C.]—A person who has built a house wall on the line of division between him and his neighbour cannot oblige the latter to contribute immediately to the payment of that part (to a height of 10 feet) which serves as a fence wall.—The right granted by Art. 520 C.C. to compel the neighbour to contribute to the building of the fence wall does not apply where a person builds the wall of his house on the division line. The neighbour, in that case, is only obliged to pay half the value of the house wall when he uses it under the ordinary rules relating to *mitoyenneté*. *Bernard* v. *Pauzé*, 14 Que. S.C. 140.

—Construction of house—Use of adjoining wall—Mitoyenneté.]—M. built a house alongside that of B. using the wall of the latter to form one of the faces of his own house. He filled with mortar the interstices between the two buildings so as to make his edifice solid and his tenants even covered over the wall of B's house:—Held, that M. could not make such use of the wall of B's house and attach his own building to it without acquiring a joint ownership with B. in the wall. *Boyer* v. *Marson*, 15 Que. S.C. 449.

— Aggravation — Adjoining lands — Flowing of water—Responsibility—Lessee under contract of sale—Art. 501 C.C.]—See ACTION, V.

—Winter road—Road bordering cultivated land —Perpetuity — Indemnity — Municipal by-law —Art. 840 M.C.

See MUNICIPAL CORPORATION, III (*g*).

SHERIFF.

—Salary—Seizure.]—No portion of a sheriff's salary is seizable. *Denton* v. *Arpin*, 14 Que. S.C. 415.

—Controverted election — Service of petition— Copy—Service by deputy sheriff—Disabilities.]

See PRACTICE AND PROCEDURE, LIII.

—Seizure under execution—Interpleader.]

See PRACTICE AND PROCEDURE, XXXIV.

—Replevin of goods illegally seized by sheriff— Chattel mortgagee's right.]—See REPLEVIN.

SHIPPING.

I. Bill of Lading.

—Affreightment—Delivery—Custom of trade.]—Where by an express condition of the bill of lading it is provided that the responsibility of the ship-owners shall cease so soon as the goods are discharged from the ship's deck to the wharf, the consignee cannot invoke in support of a claim for shortage, an alleged custom of the fruit importation trade at the port of arrival, to the effect that consignees usually take delivery only after sale of the goods by auction on the wharf, by giving delivery orders to the purchasers at the sale; and the fact that the ship-owner permitted such sale on the wharf, and assisted the consignee in the delivery of the goods to the purchasers, is not a waiver of the condition of the bill of lading. *Hart* v. *Parsons*, 15 Que. S.C. 515 (reversing 12 Que. S.C. 540, C.A. Dig. (1898) 432 *sub nom. Hart* v. *Pearson*.

—Charter party—Signature by master of bills of lading—Lien for demurrage—Cesser clause.]—Defendants' vessel was chartered to R. & Co., to carry a cargo of lumber from Annapolis, N.S., to ports in South America, at a stipulated price per thousand. The charter party contained the two following clauses:—*(a)* "Bills of lading to be signed at any rate of freight without prejudice to this charter party, but not less than the chartered rate." *(b)* "It is agreed that this charter party is entered into by the charterers for account of another party; their responsibility ceases as soon as cargo is on board, the vessel holding an absolute lien for all freight, dead freight, and demurrage." The bill of lading presented to the master for signature, contained this provision, as to the delivery of cargo:—"to be delivered, &c., unto W.M.F., or to assigns, he or they paying freight for said lumber and all other conditions as per charter party, &c." The master, claiming that the lay days provided by the charter party for loading had been exhausted, and that the ship was entitled to be paid demurrage, refused to sign the bills of lading, when they were presented to him, or to give up the cargo, except upon payment of the demurrage demanded. Plaintiff having paid the amount demanded, under protest:—Held, that the master was bound either to sign the bills of lading or to give up the cargo, and that his refusal to do so was a breach of the charter party. Held, also, that the bills of lading tendered for signature gave the owners a lien on the cargo for all demurrage legally payable under the cesser clause of the charter party. Held, also, that neither plaintiffs nor the consignees were liable to pay demurrage at the port of loading before the cargo was put on board, and that the only parties the owners could look to were the original charterers, who were not discharged from such liability by the cesser. *Forsyth* v. *Sutherland*, 31 N.S.R. 391.

—Duty of holder—Notice of arrival of goods.]
See Banks and Banking.

II. Collision.

—Collision—Ordinary care—Contributory negligence—Evidence.]—Where a ship could with ordinary care, doing the thing that under any circumstances she was bound to do, have avoided the collision, she ought to be held alone to blame for it although the other ship may have been guilty of some breach of the rules, but which did not contribute to the collision. Where the defence of contributory negligence is set up by the defendant in an action for collision, he must shew with reasonable clearness not only that the other ship was at fault, but that her fault may have contributed to the collision. *The "Porter"* v. *Heminger*, 6 Can. Ex. C.R. 208, affirming 6 Can. Ex. C.R. 154.

— Admiralty law — Collision— Rules.] — Held (following *The Franconia*, L.R. 2 P.D. 8) that where two ships are in such a position, and are on such courses, and are at such distances, that, if it were night, the hinder ship could not see any part of the side lights of the forward ship, and the hinder ship is going faster than the other, the former is to be considered as an overtaking ship within the meaning of rule 20 of the Collision Rules in force before July, 1897, and must keep out of the way of the latter. 2. No subsequent alteration of the bearing between the two vessels can make the "overtaking" vessel a "crossing" vessel so as to bring her within the operation of rule 16 in force before July, 1897. (See now rule 24 of the Collision Rules adopted by order of the Queen in Council on 9th February, 1897, and which came into force on the 6th July, 1897). *Inchmaree Steamship Co.* v. *The "Astrid,"* 6 Can. Ex. C.R. 178.

—Burden of proof—Findings of trial Judge—Appeal.]—There was a conflict of testimony on two questions of fact material to the decision of the case, both of which were found by the Local Judge in Admiralty in favour of the defendants; the burden of proof being in each case upon the plaintiffs, and there being evidence to support the findings, the Court on appeal declined to

interfere with the same. *Inchmaree Steamship Co.* v. *The "Astrid,"* 6 Can. Ex. C.R. 218.

III. Contract of Carriage.

—Ship—Breach of contract to carry passengers —Action in rem.]—The plaintiff, for an alleged breach of a contract to carry him from Liverpool to St. Michaels and thence to the Yukon gold fields, took proceedings against the ship and obtained a warrant for her arrest:—Held, that even if the breach alleged were established, the plaintiff was not entitled to a lien on the ship. *Cook* v. *The "Manauence,"* 6 Can. Ex. C.R. 193.

IV. Demurrage.

—Affreightment—Delay of ship to receive cargo —Demurrage—Liability of master of ship.]—The master of a ship, although he is liable in respect of the obligation arising under the contracts made by him as master, is not liable under a charter party not executed by him, but by the owners themselves.—The shipowners, under a charter party requiring them to give eight days' notice of readiness to receive cargo, telegraphed to the charterers, "Eight days' notice; *Coquet* due Montreal 16th; prepare cargo." The *Coquet* was not ready to receive cargo until the 22nd:—Held, that under this notice, the terms of which were absolute and unconditional, the shipowners were responsible for demurrage from and after the 17th. *Burstall* v. *Cave*, 14 Que. S.C. 110.

V. Distressed Seaman.

—Distressed seaman—Recovery of expenses— "Owner for time being"—Proof of ownership and payment.]—Sec. 213 of the Merchants' Shipping Act, 1854, makes the expenses of a seaman left in a foreign port and being relieved from distress under the Act a charge upon the ship and empowers the Board of Trade, in Her Majesty's name, to sue for and recover the same from the master of the ship or "owner thereof for the time being."—Held, that the latter words mean the owner at the time of action brought; Held, further, that a certificate of the assistant secretary of the Board of Trade that such expenses were incurred and paid is sufficient proof of payment under the Act, though the above section does not provide for a method of proof by certificate.—Notwithstanding the provision in the Imperial Interpretation Act of 1889 that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, in proceeding under the Merchants' Shipping Act of 1854 proof of ownership may be made according to the mode provided in the Merchants' Shipping Act, 1894, by which the former Act is repealed.—Under the Act 1894 a copy of the registry of a ship registered in Liverpool, certified by a Registrar General of Shipping at London, is sufficient proof of ownership. *The Queen* v. *S.S. "Troop" Co.*, 29 S.C.R. 662.

VI. General Average.

— Ship — Release from Ice.]—A liability to general average contribution arises only where both ship and cargo are in imminent and uncontemplated peril and there is expenditure or sacrifice to secure their safety. There is, therefore, no liability on the part of the cargo of a ship to general average contribution when, at a season of the year when such an occurrence is to be expected, ice forms in a harbour where a ship is lying in safety, and a tug is employed for the purpose of releasing her to enable her to complete her voyage. *Kidd* v. *Thompson*, 26 Ont. App. 220.

VII. Marshal's Fees.

— Costs — Marshal's possession — Taxation.]—Where in an Admiralty action a marshal is in possession of a ship simultaneously under warrants issued in different actions, more than one set of possession fees will not be allowed. *Sunback* v. *The Ship "Saga,"* 6 B.C.R. 522.

VIII. Mortgage.

—Equipment in possession of receiver—Seizure under fi. fa.—Jurisdiction of Supreme Court of B. C. to direct interpleader.]—Where property alleged to be part of the equipment of a ship is in the possession of a receiver appointed in an action *in rem* in the Exchequer Court to enforce a mortgage of the ship such property cannot be seized by a sheriff under a writ of *fieri facias* issued on a judgment recovered against the registered owner of the ship in the Supreme Court; and the Supreme Court has no jurisdiction on the application of the sheriff to grant an order directing the trial of an interpleader issue between the mortgagees and the judgment creditors. *Williamson* v. *Bank of Montreal*, 6 B.C.R. 486.

IX. Necessaries.

—Necessaries — Home port — Lien.]—In the absence of a contract expressed or implied to build, equip or repair within the meaning of s. 4 of 24 V. c. 10 (Imp.), the Court cannot entertain a claim for necessaries against a foreign vessel, when such necessaries are supplied in the home port of the ship where the owner resides. *Ship Owners' Dry Dock Co.* v. *The "Flora,"* 6 Can. Ex. C.R. 135.

—Necessaries—Home port—24 V., c. 10 (Imp.).] —A claim for money advanced to a foreign ship to pay for repairs, equipment and outfitting is a claim for necessaries, but where the work is done in the home port of the ship the Court has no jurisdiction, the same coming within the exception contained in s. 5 of the Admiralty Court Act, 1861 [24 V. c. 10 (Imp.)]. Payment by the agent of the owner satisfies and discharges any lien in respect to the original claim of workmen or supply-men to the extent of such payments. *Williams* v. *The "Flora,"* 6 Can. Ex. C.R. 137.

—Necessaries supplied to foreign ship in foreign port—Owners domiciled out of Canada—International law—Commercial matter—Action in rem—Jurisdiction.]—The Exchequer Court of Canada, under the provisions of 24 V., c. 10, s. 5, may entertain a suit against a foreign ship within its jurisdiction for necessaries supplied to such ship in a foreign port, not being the place where such ship is registered, and when the owners of the ship are not domiciled in Canada. *Corry Bros.* v. *The Mecca* (1895), P.D. 95, followed. Under the principles of international law, the Courts of every country are competent, and ought not to refuse, to adjudicate upon suits coming before them between foreigners. This doctrine applies with especial force to commercial matters; and is declared in the provisions of Art. 14 C.C.P. (L.C.) and Arts. 27, 28 and 29 C.C. (L.C.). *Coorty* v. *The "George L. Colwell,"* 6 Can. Ex. C.R. 196.

X. PILOTAGE.

—Pilotage and pilotage dues—Compulsory pilotage.]—Pilotage itself is nowhere compulsory in Canada; what is compulsory, is the payment of pilotage dues in certain cases even if a pilot be not used. *Lamarre* v. *Woods*, 14 Que. S.C. 1.

XI. REPLEVIN.

—Remedy by replevin.]—A ship is repleviable. *Dunsmuir* v. *Klondike and Columbian Gold Fields Co.*, 6 B.C.R. 200.

XII. SALVAGE.

—Yacht dragging anchor in public harbour—Salvage—Jurisdiction.]—A yacht, with no one on board of her, broke loose from anchorage in a public harbour during a storm, and was boarded by men from the shore when she was in a position of peril, and by their skill and prudence rescued from danger:—Held, that they were entitled to salvage. 2. The plaintiffs claimed the sum of $100 for their services:—Held, that inasmuch as the right to salvage was disputed, the provisions of s. 44 (*a*) of R.S.C. c. 81 did not apply, and that the Court had jurisdiction in respect of the action. *Lahey* v. *The "Maple Leaf,"* 6 Can. Ex. C.R. 173.

XIII. SEAMAN'S WAGES.

—Lien—Musician.]—In the absence of a contract to pay him wages, a musician is not a "seaman" within the meaning of the Merchant Shipping Act, and therefore is not entitled to a maritime lien for his services. *McElhaney* v. *The "Flora,"* 6 Can. Ex. C.R. 129.

—Wages—Saleswoman—Seaman.]—The word "seaman" as used in the 2nd section of The Merchant Shipping Act, 1854, and The Inland Waters Seamen's Act (R.S.C. c. 75) includes a person in charge of a confectionery stand on board a vessel, and who was engaged by the owner of the boat to perform these services. *Connor* v. *The "Flora,"* 6 Ex. C.R. 131.

—Watchman—Lien for wages.]—The caretaker of a ship not in commission is not a "seaman," and has no lien for his wages. *Brown* v. *The "Flora,"* 6 Can. Ex. C.R. 133.

—Action for wages—Assignment—Rights of assignee—Action in rem.]—The right of action *in rem* for wages cannot be assigned. *Rankin* v. *The Eliza Fisher*, 4 Ex. C.R. 461 followed. *Bjerre* v. *The Ship "J. L. Card,"* 6 Can. Ex. C.R. 274.

—Second officer—Seizure—Assignment.]—The second officer of a ship is a "seaman" within the meaning of R.S.C. c. 74, s. 80.—By virtue of said section, the wages of the second in command of a registered schooner cannot be attached, and any interested party may invoke such exemption.—The officer may assign his wages, but no such assignment binds him or prevents him from receiving payment. This privilege, however, appertains to him alone, and no other person can avail himself of it. Hence it follows that the *cessionaire* of the wages of a second officer or seaman may invoke the nullity of the seizure thereof, but the seizing creditor cannot set up in answer that the assignment (*transport*) is void, and that the *cessionaire* has no interest. *Mercier* v. *Mercier*, 14 Que. S.C. 383.

—County Court Judge—Jurisdiction—Complaint.]—Under Revised Statutes of Canada, c. 74, s. 52, to enable a seaman to sue for and recover his wages the complaint must shew all the facts and circumstances which under the statute give the Court jurisdiction, and unless such complaint does disclose all things necessary to give jurisdiction it cannot be supplemented by evidence, and the judgment will be set aside. *Ex parte Andrews*, 34 N.B. R. 315.

And see INSURANCE, IV.

SIMULATION.

—Partnership—Deed of dissolution—Fraud.]

See PARTNERSHIP, II.

SOLICITOR.

—Agreement for compensation—Champerty—Exchequer Court—Taxation.]—An agreement by a solicitor to prosecute a claim to judgment at his own expense in consideration of his receiving one-fourth of the amount which should be recovered is champertous and void. Per Moss and Lister, JJ.A. A solicitor of the Supreme Court of Judicature for Ontario, who as such does business in carrying on proceedings for a client in the Exchequer Court of Canada is subject to the provisions of the Solicitors' Act with regard to delivery and taxation of his bill of fees, charges or

disbursements in respect of such business. *O'Connor* v. *Gemmill*, 26 Ont. App. 27, reversing in part 29 Ont. R. 47 and C.A.Dig. (1898), 433.

—Lien—Settlement of action—Notice—Collusion—Fruits of litigation—Collateral proceeding.]—After judgment had been recovered by the plaintiff against the defendants for $550 damages and for costs, and while an appeal was pending, the plaintiff and defendants, without the knowledge of the plaintiff's solicitors, made an agreement for settlement of the action upon the plaintiff being taken into the defendants' employment and paid $150 in full of damages and costs. The plaintiff's solicitors asserted a lien for their costs, which were unpaid, and gave notice thereof to the defendants before any money was actually paid over to the plaintiff:—Held, that the compromise made was not a collusive one, and the solicitors were therefore not entitled to an order upon the defendants for the payment of their costs; but, such costs, amounting to more than $150, that they were entitled to have that sum, for which the action was compromised, and which was to be treated as the fruits of the litigation, paid over to them in respect of their lien. Held, also, that a question arising between the plaintiff and his solicitors, as to whether they were entitled to taxed costs as between solicitor and client, or to a percentage upon the amount recovered, could not be determined upon the motion to enforce payment by the defendants of the plaintiff's solicitors' costs, but had to be determined in another proceeding before the determination of such motion. *Walker* v. *Gurney-Tilden Co.*, 18 Ont. Pr. 274.

—Bill of costs—Payment—Delivery—Equivalent—Examining dockets.]—Where no bill of costs has been delivered by a solicitor to his client, there cannot be payment within the meaning of s. 49 of the Solicitors' Act, R.S.O. c. 174, which refers to the payment of a delivered bill. And where one of the solicitors and their client, according to the solicitor's evidence, together examined the items in the solicitors' dockets, which amounted to over $1,500, and the solicitor explained that certain entries had not been made which would amount to $300, and the client paid the solicitors $1,500 in full settlement:—Held, that this was not equivalent to the delivery of a bill and payment after consideration. *Re Pinkerton*, 18 Ont. Pr. 331.

—Signature of attorney—Inscription in review—Signature by another party.]—An inscription in review, signed by another person in the name of the attorney with the latter's authority, is valid, provided the opposite party suffers no prejudice thereby. *Cantin* v. *Belleau*, 15 Que. S.C. 7.

—Lien for costs—Right of solicitor to be protected as against attaching creditor.]—As the result of extensive litigation between M. and the P. Gold Mining Co., in which W. was solicitor for the company, costs became payable by M. to the company, under a judgment of the Privy Council. For these costs, a judgment was entered up against M., upon which the sum of $1,455.14 was admitted to be due. Subsequently, O. and others, having obtained judgment in this Court against the company, obtained an *ex parte* garnishee order, attaching all debts due from M. to the company. After service of the order upon the garnishee, W. served notice upon the garnishee, claiming a solicitor's lien on the judgment for costs, and, on application by the judgment creditors for an order for payment to them by the garnishee of the amount due by him to the judgment debtor, W. appeared and claimed to have a lien on the judgment for the costs which were thereby recovered by the judgment debtor against the garnishee. He also applied to have an issue stated for trial. The learned Judge, who heard the application, having dismissed the claim made by W., and ordered payment by the garnishee to the judgment creditors of the balance due on the judgment, W. appealed:—Held, per Meagher, J., Townshend, J., concurring, that W. had a lien upon the judgment for his costs, which the Court would protect. Also, that the attaching creditor, under the garnishee order, took no more than the rights of the debtor, and that, as, in a contest between solicitor and client, the Court would assist the former, under the circumstances shewn, equally so, must it aid him, where the contest was between the solicitor and the person who had suceeded to the rights of the client; Held, also, that, under O. 63, R. 11, the existence of a solicitor's lien for costs is clearly recognized; Held. also, that the burden was upon respondent to shew clearly that the lien had been displaced; Held, also, that there is no substantial difference between the solicitor's rights here, in cases, where it is proper to protect him, and those of a solicitor in England, who takes no effective proceedings to obtain a charging order under the statute until after the attaching order has been served. *Palgrave* v. *McMillan*, 31 N.S.R. 488.

—Fraudulent misappropriation—Mortgage—Foreclosure proceeding—Agency—Estoppel.]—Defendant, who was desirous of purchasing from C. land of which C. was the owner, subject to a mortgage for $1,000, held by F., was referred by C. to M., as his solicitor, through whom the negotiations could be carried on. When the negotiations were completed defendant paid to M. the sum of $1,600, which represented the whole price of the property, including the amount of the mortgage held by F. M. absconded from the province without having paid over to F. the amount due her. The evidence shewed that F. executed a release of the mortgage and delivered it to E. C., with instructions not to allow it to go out of her hands until she received the money, and that E.C. placed the release for a time in the hands of M., to whom she communicated her instructions,

and that the release was finally returned to E.C. by M. It appeared, however, that M. was never employed in any capacity by F., and that F. was not aware that the release was in his hands. In an action by plaintiff, as executor of F., for the foreclosure of the mortgage:—Held, that plaintiff was entitled to the foreclosure sought. Held, also, that plaintiff was not estopped by statements made by E.C. to defendant after the payment of the money by defendant to M., from which it was claimed defendant was led to believe that F. had been made aware that the money had been paid over to M., and that she looked to him for payment, it not appearing that E.C. made the statements in question, intending that defendant should act upon them, or that the statements were of such a character that any man of ordinary intelligence would be likely to believe them to be true, and that they were meant to be acted upon. Held, further, that plaintiff could not be estopped from shewing the real facts by other statements made by E.C. to a third party, and, without authority, repeated to defendant. *Ross* v. *Sutherland*, 32 N.S.R. 243.

— Compromise of action by client —Costs.]—Where a defendant in good faith settles an action with the plaintiff in such a way as to deprive the plaintiff's solicitor of his costs, such solicitor is not entitled to leave to proceed with the action for the recovery of his costs. *Rideout* v. *McLeod*, 6 B.C.R. 161.

—Service on agents.]—Where the general city agents of a firm of country solicitors have never acted as agents in a particular suit, the service on them of a summons in that suit is insufficient. *Barnes* v. *Gray*, 6 B.C.R. 219.

—Costs—Solicitor-trustee—Proceeding in Surrogate Court.]—A solicitor-trustee, acting on behalf of himself and his co-trustee, is entitled to profit costs for preparing the accounts of the trustee and attending the audit thereof before the Judge of a Surrogate Court. *Re Corsellis*, 34 Ch. D. 675, followed. *Re McNab*, 19 C.L.T. (Occ. N.) 74.

—Costs—Solicitor's lien—Order enforcing—Appeal.]—See APPEAL, XI (*c*).

—Solicitor and client—Immoral agreement between—Enforcement.]—See CONTRACT, XI.

—Separate defences—Common enquête—Right of solicitors to separate costs.]—See COSTS, XVII.

—Taxation of costs against client—Scale.]

See COSTS, XX.

—Costs set off—Solicitor's lien for—Prejudice.]

See COSTS, XXIII (*f*).

—Set-off for solicitor's costs.]—See COSTS, XX.

—Retainer of counsel by.]—See COUNSEL.

—Executors—Setting apart a fund—Fraud of solicitor—Liability.]

See EXECUTORS AND ADMINISTRATORS, VII.

—Lien for costs—Attaching order—Priorities—Waiver of lien.]

See LIEN, VII.
" ATTORNEY.
" BARRISTER.

SOLIDARITÉ.

—Promissory note—Acte de commerce—Surety—Guarantee by third party—Attorney—Mandat.]

See ATTORNEY.
" COMMERCIAL TRANSACTIONS.
" PRINCIPAL AND SURETY, I.

—Expertise—Fees of experts — Payment — Deposit in Court—Art. 414 C.C.P.]

See EXPERTISE.

SPECIAL CASE.

See PRACTICE AND PROCEDURE, LIV.

SPECIFIC PERFORMANCE.

See CONTRACT.

SPEEDY TRIAL.

— Adjournment — Material Witness — Criminal Code Art. 777.]—See CRIMINAL LAW, XIX.

STATUTE.

I. APPLICATION.
II. CONSTRUCTION.
III. PLEADING STATUTE.
IV. REPEAL.

I. APPLICATION.

—20 & 21 V., c. 54, s. 12 (Imp.)—Criminal prosecution—Embezzlement of trust funds—Suspension of civil remedy—Stifling prosecution—Partnership.]—See CRIMINAL LAW, VI.

—Railway Act, 1888, s. 256.]—S. 256 of the Railway Act, 1888, providing that "the bell with which the engine is furnished shall be rung, or the whistle sounded, at the distance of at least eighty rods from every place at which the railway crosses any highway, and be kept ringing or be sounded at short intervals until the engine has crossed such highway," applies to shunting and other temporary movements in connection with the

running of trains as well as to the general traffic. *Canada Atlantic Ry. Co.* v. *Henderson*, 29 S.C.R. 632; affirming 25 Ont. App. 437.

—Assessment—Montreal harbour improvements—Widening streets.]

See ASSESSMENT AND TAXES, VIII.

—Ditches and Watercourses Act (Ont.).]—S. 24 of the Act, which provides that an award thereunder, after expiration of the time for appealing to the Judge, or after it is affirmed on appeal, shall be binding notwithstanding any defects in form or substance either in the award or any of the proceedings, does not validate an award or proceedings where the party initiating the latter is not an owner. *Township of McKillop* v. *Township of Logan*, 29 S.C.R. 702.

—Lord's Day Act, R.S.O. c. 246.]—The Lord's Day Act, R.S.O. c. 246 does not apply to the Grand Trunk Railway, and an employee thereof prosecuting his ordinary calling on Sunday does not come within its inhibition. *The Queen* v. *Reid*, 30 Ont. R. 732.

—Statute imposing fine and imprisonment—Discretion of Court.]—See CRIMINAL LAW, XVII.

—60 V., c. 50 (P.Q.)—Contrainte par corps—Abolition—Pending causes.]—*Contrainte par corps*, as it had existed in Quebec up to Sept. 1st, 1897, was abolished by a special Act (60 V., c. 50) which came into force on that day; the abolition was made without reserve and therefore applied to causes pending when it took effect. *Roger* v. *Loranger*, 8 Que. Q.B. 119.

—Arts. 566 et seq. C.C.P.—Reddition de comptes—Commercial matters.]—The provisions of Arts. 566 *et seq.* C.C.P. concerning the *reddition de comptes* do not apply in commercial transactions or to the accounts which a bank should render to its customers. *Acer* v. *Bank of Toronto*, 14 Que. S.C. 187.

—Art. 279 C.C.P.—Delays—Péremption d'instance—Rétroactivity.]—Art. 279 of the new Code of Civil Procedure, which reduces the term of the *péremption d'instance* to two years, does not apply retroactively to a cause in which this term began to run under the former Code. *Charette* v. *Howley*, 14 Que. S.C. 481.

—Qui tam action—Affidavit—R.S.Q. Arts. 5716, 5719.]—The words "any act" in Art. 5719 of the Revised Statutes of Quebec, means any Act of the Provincial Legislature. Therefore the exception contained in that article does not apply to the Dominion Prohibition Plebiscite Act 1898, and an affidavit was necessary, under Art. 5716 of the Revised Statutes of Quebec, before the issue of a writ in an action for a penalty under the said Plebiscite Act. *Timmis* v. *Lewis*, 15 Que. S.C. 233.

—Prohibition Plebiscite Act of 1898, s. 6—Dominion Elections Act, s. 83—Sale of liquor on election day.—The effect of s. 6 of the Prohibition Plebiscite Act of 1898 was to make the disposition of s. 83 of the Dominion Elections Act applicable to the taking of the vote under the former Act, and the sale of intoxicating liquor within any polling district on polling day, was prohibited. *Timmis* v. *Hillman*, 15 Que. S.C. 365.

—Art. 922 C.C.P.—False allegations—Capias—Delays.]—Art. 922 C.C.P. does not limit the time for service and presentation of an objection based on the falsity of allegations in proceedings by capias, but has the effect merely of determining the mode in which, and the delays within which, the defendant shall proceed to trial of the issue upon such objection. *Poirier* v. *O'Dell*, 2 Que. P.R. 30.

—Costs—21 Jac. I., c. 16.]—The statute 21 Jac. I., c. 16, is in force in New Brunswick. *Gallagher* v. *O'Neill*, 34 N.B.R. 194.

—Life insurance—Policy payable to wife of assured—Will disposing of policy—58 V., c. 25, s. 7.]—S. 7 of Act 58 V., c. 25, does not apply to a will made before the passing of the Act, varying a policy of life insurance. *Leonard* v. *Leonard*, 1 N.B. Eq. 576.

—Interpretation Act—R.S.B.C. c. 1, s. 10—Application.]—R.S.B.C. c. 1, s. 10, s.s. 20, is not confined to matters of procedure only. *Re Nelson City By-law No. 11*, 6 B.C.R. 163.

II. CONSTRUCTION.

—Canadian Railway Act (51 V., c. 29), s. 262—Railway Committee of Privy Council.]—Under the true construction of the Railway Act (Canada), 51 V., c. 29, the power conferred by s.s. 4 of s. 262 upon the Railway Committee of the Privy Council to exonerate a railway company during a specified portion of the year from the duty of filling certain spaces specified in s.s. 4, does not apply to the duty imposed by s.s. 3 of filling certain other spaces specified by s.s. 3. Such extension of power is not authorized by the grammatical construction of the sub-sections, nor rendered imperative by the context. *Grand Trunk Ry. Co.* v. *Washington*, [1899] A.C. 275, affirming 28 Can. S.C.R. 184.

—Municipal Code of Quebec, Art. 712—Property of corporation—Liability to taxation.]—By the true construction of Art. 712, s.s. 3, of the Municipal Code of Quebec, property belonging to a corporation "for the ends for which they are established, and not possessed solely by them to derive a revenue therefrom," is not taxable. *Seminary of Quebec* v. *Corporation of Limoilou*, [1899] A.C. 288, affirming 7 Que. Q.B. 44.

—Permissive statutory powers—Injunction—Liability for damages—Irrigation—Land slides.]—Wherever, according to the sound construction of a statute, the legislature has authorized a proprietor to make a particular

use of his land, and the authority given is in the strict sense of law permissive merely, and not imperative, the Legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others. *Metropolitan Asylums District* v. *Hill*, 6 App. Cas. 193, approved.—Where the effect of British Columbian legislation was to authorize the respondents to irrigate their soil by the compulsory diversion of water from any adjacent stream, lake or river, by conveying it over lands which do not belong to them, and to run the surplus water after irrigation through adjacent lands by means of flumes, ditches, or drains, all subject to provisions for compensation, and the respondents brought water upon their land in such manner as to be the substantial cause of damage to the appellants' line of railway by causing a slide of their land:—Held, that, in the absence of provisions shewing an intention on the part of the Legislature to take away the appellants' right to protect their property from invasion, they were entitled to an injunction to prevent the respondents' user of the water in disregard of their common law obligation to do no damage to the appellants' land. *Canadian Pacific Ry. Co.* v. *Parke*, [1899] A. C. 535, reversing 5 B.C.R. 507.

—12 V., c. 183, s. 20 (Can.)—Right to stop supply of gas generally.]—By the true construction of s. 20 of 12 V., c. 183 (Can.), borrowed from the Gasworks Clauses Act, 1847 (Imp.), the appellant company is authorized to cease supplying the respondent with gas at any of his houses on his neglect to pay its bill for any one of them. There is nothing in the section to limit the authority of the company to the particular building in respect of which there has been default, and such a limitation cannot be implied. *Montreal Gas Co.* v. *Cadieux*, [1899] A.C. 589, reversing 28 Can. S.C.R. 382.

—Criminal Code, 1892.]—See CRIMINAL LAW.

—14 & 15 V., c. 6 (Ont.)—Devise to heirs.]—The Ontario Act 14 & 15 V., c. 6, abolishing the law of primogeniture in the province, placed no legislative interpretion on the word "heirs." Therefore, where a will made after it was in force devised property on certain contingencies to "the heirs" of a person named, such heirs were all the brothers and sisters of said person and not his eldest brother only. *Wolff* v. *Spa[illegible]*, 29 S.C.R. 585 affirming 25 Ont. App. 326.

—Merchant Shipping—Distressed seaman—Recovery of expenses.]—Sec. 213 of the Merchants' Shipping Act, 1854, make the expenses of a seaman left in a foreign port and being relieved from distress under the Act a charge upon the ship and empowers the Board of Trade, in Her Majesty's name, to sue for and recover the same from the master of the ship or "owner thereof for the time being":—Held, that the latter words mean the owner at the time of action brought. Notwithstanding the provision in the Imperial Interpretation Act of 1889 that the repeal of an Act shall not affect any suit, proceeding or remedy under the repealed Act, in proceedings under the Merchants' Shipping Act of 1854 proof of ownership of a ship may be made according to the mode provided in the Merchant's Shipping Act, 1894, by which the former Act is repealed. *The Queen* v. *Sailing Ship "Troop" Co.*, 29 S.C.R. 662.

—Insurance.]—See INSURANCE.

—Corporations and company law.]

See COMPANY.

—Art. 522 C.C.P. (old text)—Art. 567 C.C.P.]—The word "nominativement," in Art. 522 of the Code of Civil Procedure (old text Art. 567 of the new Code), which provides that an account should be rendered *nominativement* to the person entitled to it is not imperative *(sacramental)*, and it is sufficient if the account is rendered by the person whose duty it is to do so, to him who demands it. *Evans* v. *Wilson*, 8 Que. Q.B. 144.

—Art. 833 C.C.P.—Art. 2272 C.C.—Injures personnelles—Torts personnelles—12 V., c. 42, s. 15 (P.Q.)—C.S.L.C., c. 87, s. 24.]—The words "*injures personnelles*" in Art. 833 C.C.P., and in Art. 2272 C.C., which it now replaces, have the same sense as the words "*torts personnelles*" in 12 V., c. 42, s. 15, and in C.S.L.C. c. 87, s. 24. *Peltier* v. *Martin*, 14 Que. S.C. 223.

—52 V., c. 79, s. 92 (P.Q.)—Valeur actuelle—Valuation of immovable.]

See ASSESSMENT AND TAXES, XIV.

—Privilege of unpaid vendor—Time within which it must be exercised—Arts. 1998, 2000 C.C.]—Where one disposition of law is in general terms, and another states a particular rule for a special case, then, irrespective of the relative order in which the dispositions are enacted, the particular enactment derogates from the general. Applying this principle to the interpretation of Arts. 1998 and 2000 C.C., the second paragraph of Art. 1998 is to be read as creating an exception to the general rule regulating the effect of the vendor's privilege as laid down in Art. 2000 C.C., in so far as the latter article permits the exercise of the vendor's privilege, after the expiration of the delay fixed for revendication, and, in the special case of insolvency, such privilege must be exercised within thirty days after the delivery of the goods sold. *Re Renaud & Bradshaw*, 14 Que. S.C. 452.

—Art. 6, par. 2 C.C.—Droits de gage.]—The words "*droits de gage*" in par. 2, of Art. 6 C.C., refer to the security which is in question under Arts. 1968, *et seq.*, and not to the lien given by Art. 1981, to a creditor on the property of his debtor. *Barker* v. *Central Vermont Ry. Co.*, 14 Que. S.C. 467.

—Variance between French and English versions —Interpretation.]—The English and French versions of our statutes are of equal authority, but when a difference occurs between the two versions, there is uncertainty as to the intention of the legislature, and one or other of the versions must prevail according to the following rules:—(1). If the variance occurs in a statute consolidating previous statutes or in a statute founded upon our pre-existing law, that version must prevail which is the more consistent with the former law; (2). If the variance occurs in a statute changing the law that version shall prevail which is the more consistent with the intention of the legislature, and the ordinary rules of legal interpretation shall apply to determine such intention. Thus, where in a penal statute the French version is restrictive and the English not, the French must be followed. *Roy* v. *Davidson*, 15 Que. S.C. 83.

—Properties "fronting" on lines of streets—Widening or opening.]—Where it is clear on the face of a statute that it was intended to govern and provide for a particular state of facts, the Court will so modify the ordinary meaning of words as to permit such intention to have effect. Therefore, in 57 V., c. 57, s. 1, the word "widening," in reference to Milton street being used evidently by inadvertence for "opening," the statute should be interpreted so as to give effect to the intention of the legislature. *Joseph* v. *City of Montreal*, 10 Que. S.C. 531 (decided under the same statute) referred to. The words "properties fronting" on the line of a street include properties adjoining or contiguous to the line of the street on any side, although the buildings thereon front on a street intersecting the other, and the properties are only bounded on the side line by the street first mentioned. *Watson* v. *Maze*, 15 Que. S.C. 268.

—Contrainte par corps—Service—Art. 837 C.C.P. —Imperative provision.]—The provision contained in Art. 837 C.C.P., requiring personal notice to the party liable, of an application for a rule for coercive imprisonment, is imperative, and where the service has not been personal the defect is fatal, and is not cured even by the appearance of the party by attorney, and his failure at the time to invoke the defect of service. *Lamothe* v. *Lamothe*, 15 Que. S.C. 342.

—Art. 2262, par. 4 C.C.—Prescription.]—Par. 4 of Art. 2262 C.C. is not new law, and the prescription prescribed by it applies only to hotelkeepers, boarding-house keepers, and other persons carrying on such business. *Marcotte* v. *Hand*, 2 Que. P.R. 145, overruling the *motifs* of 15 Que. S.C. 360 while affirming its result.

—Man. Queen's Bench Act, 1895—60 V., c. 4—Sale of land under judgment.]

See PLEADING, XVI.

—Post-mortem — Withdrawal — County Crown Attorney—Consent in writing—R.S.O. c. 97, s. 12 (2)—Construction.]—See CORONER.

III. PLEADING STATUTE.

—Two statutes under same title.]—Where there are two statutes, the short titles of which are identical, a defendant pleading one of them should make it plainly appear on which he relies, but he need not plead the particular section. *Kirk* v. *Kirkland*, 6 B.C.R. 442.

IV. REPEAL.

—Ordinance of 1667 tit. 19 Arts. 20, 22—Arts. 577 C.C.P. (old text)—Seizure—Discharge of guardian.]—Art. 20 and 22 title 19 of the ordinance of 1667, providing that a guardian of effects seized shall be discharged *de plein droit* by a lapse of two months after the dismissal of an opposition to the seizure have been repealed by the Code of Civil Procedure. *Archambault* v. *Society of Bailiffs of Montreal*, 14 Que. S.C. 213.

—Édit des secondes noces—41 Geo. 3, c. 4—Testamentary powers—Arts. 831, 1467 C.C.]—The statute of 1801, 41 Geo. III., c. 4, now embodied in Art. 831 C.C., which gave absolute freedom in the disposal of property by will, abrogated the provision of the *édit des secondes noces* prohibiting a widow from allowing a second or subsequent husband to participate in what she acquired by the gifts and liberalities of the first husband, to the prejudice of the children by the first marriage. *Perrier* v. *Palin*, 14 Que. S.C. 332.

—General and special statutes — Intention of legislature.]—A general statute repeals special Acts upon the same subject when the intention of the legislature to repeal them is clearly indicated.—When it does not appear that the intention of the legislature was to incorporate the special Act in the later general statute, or when in the two Acts nothing is found to render improbable the exclusion of the special Act, the latter is not to be considered as repealed. *Garant* v. *Carrier*, 15 Que. S.C. 601.

STATUTE OF ELIZABETH.

—Preference—Fraudulent Conveyance — Consideration—Untrue statement — Onus of proof — Sheriff.]—*Gignac* v. *Iler*, 25 Ont. App. 393, affirming 29 Ont. R. 147 and C.A. Dig. (1898) 443.

— Debtor and creditor — Preference—Fraudulent conveyance—13 Eliz., c. 5 (Imp.).]—An insolvent debtor being in expectation that his property would be seized under execution conveyed to his father, who had a knowledge of his son's insolvency, land previously conveyed by the father to the son in consideration of the son's bond to support and maintain him and his

wife for their lives. The father afterwards conveyed the land to the son's wife in consideration of her paying off a mortgage upon the land and agreeing to support the father and his wife:—Held, that the conveyance from the son to the father, having been made *bond fide* and for valuable consideration, and not for the purpose of retaining a benefit to the son, was good within the statute 13 Eliz. c. 5, though made for the purpose of preferring the father as against other creditors. *Atkinson* v. *Bourgeois*, 1 N.B. Eq. 641.

STATUTE OF FRAUDS.

—Contract—Partnership—Dealing in lands—Parol agreement.]—A partnership may be formed by parol agreement notwithstanding that its object may be to deal in lands as the Statute of Frauds does not apply to such a case. *Archibald* v. *McNerhanie*, 29 S.C.R. 564.

—B. C. mining law—Interest of a free miner in his mineral claim.]

See MINES AND MINERALS, V.

—Partnership—Purchase of land for use of—Parol agreement.]—See PARTNERSHIP, V.

STATUTORY CONDITIONS.

—Foreign statute—Force in the province of Quebec—R.S.O. (1897) c. 203, s. 168.]

See INSURANCE, II.

STAYING PROCEEDINGS.

—Action for rent—Staying proceedings—Appeal from order.]

See APPEAL, VII.
" PRACTICE AND PROCEDURE.

STENOGRAPHER.

—Court stenographer—Person undertaking to act as such—Estoppel—Copy of notes—Fees.]—A person who undertakes to act as Court stenographer cannot refuse to furnish parties to a suit with a transcript of his notes merely because his fees have not been paid by the Crown. *Pender* v. *War Eagle; Ex parte Jones*, 6 B.C.R. 427.

—Letters—Stenographic notes of—Property in—Implied contract—Breach—Publication—Injunction—Public interest.]—See INJUNCTION.

STIPENDIARY MAGISTRATE.

—Jurisdiction of stipendiary magistrate to commit when offence occurs outside his jurisdiction.]

See CRIMINAL LAW, XVI.

—Ont. Liquor License Act—Police magistrate—Territorial jurisdiction.]

See LIQUOR LICENSE.
And see JUSTICE OF THE PEACE.

STOCK EXCHANGE.

—Usage of Stock Exchange.]

See COMPANY, XI.

STREET.

—Conviction for using profane language on street—Certiorari.]

See PRACTICE AND PROCEDURE, XI.

STREET RAILWAYS.

—Contract—Running cars—Specific performance—Injunction—Mandamus.]—The Court will not order specific performance of an agreement by an electric railway company to run its cars on certain streets at certain hours and with certain officers, as the Court cannot oversee the carrying out of the judgment if granted. Nor will the Court grant an injunction restraining the company from carrying out such an agreement to the extent to which they are willing to carry it out unless and until they carry it out *in toto*, as this would also involve the same minute supervision. Nor will the Court direct in an action the issue of a writ of mandamus, where the duty to be fulfilled arises out of an agreement of this kind the performance of which in specie is not deemed enforceable by the Court:—*Semble*, a prerogative writ of mandamus cannot be granted in an action but only on motion, but even if it can be granted in an action it will not be granted to enforce private rights arising under an agreement. *City of Kingston* v. *Kingston, Portsmouth and Cataraqui Electric Ry. Co.*, 25 Ont. App. 462, affirming 28 Ont. R. 399, and C.A.Dig. (1897), 365.

—Negligence—Damages—New trial.]—*Fraser* v. *London Street Ry. Co.*, 26 Ont. App. 383; affirming 29 Ont. R. 411 and C.A. Dig. (1898) 444.

—Negligence—Operation of car—Collision—Contributory negligence—Proximate cause—Nonsuit.]—Where the evidence of negligence and of contributory negligence are so interwoven that contributory negligence is brought out and established on the evidence of the plaintiff's witnesses, if there is no conflict on the facts in proof, the Judge may withdraw the question from the jury and direct a nonsuit. *Wakelin* v. *London and South-Western R. W. Co.*, 12 App. Cas. at p. 52 referred to.—In an action against a street railway company for negligence, it appeared that an electric car of the defend-

ants was being run at a very rapid speed, and that the gong was not sounded as the car approached a certain street, at the junction of which the plaintiff, who was driving a horse along the same street and in the same direction in which the car was going, turned in front of the car to cross the rails, when a wheel of his vehicle was struck by the car, and he was injured. It also appeared by the evidence of his own witnesses that he did not, before turning, look or listen to ascertain the position of the car, although he knew it was coming—Held, that this was negligence on his part, and was the proximate cause of the disaster, for the defendants could not, by the exercise of reasonable or any degree of diligence or care, after this negligence of the plaintiff, have avoided the misfortune. *Danger* v. *London Street Ry. Co.*, 30 Ont. R. 493.

—Tram company—Negligence of motorman—Speed.]—Plaintiff's driver, who was proceeding in the same direction as a tram car owned by the defendant company, stopped his cab, to allow a passenger to alight. He then turned, and attempted to cross the track upon which the car was running, about two car lengths ahead of the car. The motorman, who had been ringing his gong, when he saw the cab turn across the track, put on his brakes; then, seeing that he could not stop in time to avoid a collision, released the brakes and applied the current the reverse way. A collision having occurred, and an action having been brought by plaintiff, to recover damages for the injury done to the cab, the jury found that the car was running at too high a rate of speed, and that the motorman was negligent in failing to apply the brakes, or reverse the current, in time to avoid the accident:—Held, dismissing defendant's appeal, that the question of speed was one for the jury, and, there being evidence to support their finding, that the Court should not interfere. *Inglis* v. *Halifax Electric Tram Co.*, 32 N.S.R. 117.

—Dominion Railway Act not applicable to municipal control—Persons in charge of street car.]—Defendants were convicted of operating cars in the city of Toronto which had no vestibule protection for conductors as alleged to be required by a city by-law, which provided that all cars were to be provided with "vestibules to protect the motorman and persons in charge of such car from exposure, etc." On appeal to the County Judge from a conviction made by the Police Magistrate:—Held, 1. An electric street railway does not become a Dominion railway or work, and as such removed from the legislative control of a local Legislature, by reason of its tracks crossing the tracks of two Dominion railways. 2. A conductor of a street railway company is a "person in charge of a car" within the meaning of the by-law. *The Queen* v. *Toronto Ry. Co.*, 35 C.L.J. 422.

—Bridge under municipal control—Use for tram cars—Accident—Liability.]

See MUNICIPAL CORPORATIONS, XI.

SUBROGATION.

—Sale subject to usufruct—Creditor executing writ—Proceeds of sale—Opposition.]

See SALE OF LAND, XIII.

SUBPOENA.

—Alterations and interlineations in.]

See PRACTICE AND PROCEDURE, LXII.

SUBSTITUTION.

—Title to land—Entail—Life-estate—Privileges and hypothecs.]—Upon being judicially authorized, the institute in possession of a parcel of land in the City of Montreal, *grevé de substitution*, and a curator appointed to the substitution, mortgaged the land, under the provisions of the Act for the relief of sufferers by the Montreal fire of 1852, 16 V., c. 25, to obtain a loan which was expended in reconstructing buildings on the property. Default was made in payment of the mortgage moneys and the mortgagor obtained judgment against the institute and caused the land 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 land 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*, notwitstanding the omission to make the curator a party to the action or proceedings in execution against the 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 a 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 extent of the repairs.—The sheriff seized and sold lands under execution against a defendant described in the writ of execution, process of seizure and in the deed 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. *Vadeboncœur* v. *City of Montreal*, 29 S.C.R. 9.

—Sheriff's sale—Vacating sale—Refund of price paid—Exposure to eviction.]—The provisions of article 714 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 so 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. The procedure by petition provided by the Code of Civil Procedure for the vacating of sheriff's sales can only be invoked in cases where an action would lie. *Trust and Loan Co. of Canada* v. *Quintal*, 2 Dor. Q.B. 190, followed. Mere exposure to eviction is not a sufficient ground for vacating a sheriff's sale. 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 deed creating a substitution, 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*, 29 S.C.R. 274.

—Acceptance by institute—Parent and child—Rights of children not yet born—Revocation of deed.]—A substitution created by a donation *inter vivos* in favour of the children of the institute, even before they are born, is irrevocable after acceptance by their parent, and the law of the Province of Quebec on the subject, as declared by the Civil Code, is the same as the old law of that province in existence before the promulgation of the Civil Code of Lower Canada. Where an institute has accepted a donation creating a substitution in favour of his children, his acceptance as institute constitutes valid acceptance of the substitution on behalf of his children thereafter born to him during marriage. Where the title deed of a purchaser of lands bears upon its face recitals which would have led upon inquiry to evidence of the defeasibility of his vendor's title, he must be presumed to have been aware of the precarious nature of the title he was purchasing, and prescriptive title cannot afterwards be invoked either by him or those in possession under him as holders in good faith under translatory title. As good faith is required for the ten years prescription under the Civil Code, that prescription cannot be invoked against a substitution which has been duly registered, such registration being sufficient to constitute any third party, who might subsequently purchase from the institute a holder in bad faith. *Meloche* v. *Simpson*, 29 S.C.R. 375.

—Revenues—Partition—Receipt of revenue by appelé—Account.]—The *appelé* who, since the opening of the substitution and before partition, has received the revenues proceeding from the substituted immovable subject to partition should render an account of them. *Latour* v. *Latour*, 14 Que. S.C. 448.

SUCCESSION.

—Vacant succession—Appointment of curator—"Party interested"—Art. 685 C.C.—Claim to be lawful heirs—Proof.]—Parties intervening in a suit and basing their demand on the allegation that they are lawful heirs of a person deceased, must shew that they were in existence at the time of his death. Where it appears that there were other relatives more nearly related to the deceased than the parties claiming, and who excluded the latter from the succession, the intervenants' claim cannot be maintained. Acts done by a curator to a vacant succession illegally or irregularly appointed, are radically null as against the heir who presents himself to claim the succession, save at all events in the case where they should be treated as binding in the interest of third persons dealing in good faith with such curator, and who could not know of the irregularity of his appointment. Where upon the face of an appointment of curator it appears that it was made upon the petition of a person not shewing nor alleging any interest whatever in having the appointment made, the appointment is null. By a "party interested," on whose demand only a curator to a vacant succession can be appointed (C.C. 685), is meant a party having some right to exercise in or against the succession which is vacant, and for the exercise whereof it is essential that a representative of the succession be appointed, or a debtor thereof having an interest that some one be named competent to receive payment and grant him a discharge on behalf of the succession. The fact of being a sister-in-law of a person deceased gives rise to no right in or against his succession, and creates no interest in having a curator appointed to it. *Craig* v. *Maloney*, 14 Que. S.C. 255.

—Bar to action—Plea in warranty—Renunciation of succession to get rid of bar.]—A plaintiff whose action is barred by a plea of warranty in relation to the property claimed by the action (Art. 953 C.C.) cannot renounce the succession after the trial in the cause so as to get rid of this disability. *Page* v. *McLennan*, 14 Que. S.C. 392.

—Acceptance—Minor—Action.]—Though the minor child of the plaintiff could not accept the succession of the mother except under benefit of inventory, the plaintiff himself, who is of age, can do so, both as regards the succession of the mother and that of the child.—The bringing of a suit in his own name is, in so far as concerns the plaintiff personally, a sufficient acceptance of the estate. *Bourget* v. *Colonial Mutual Life Association*, 15 Que. S.C. 209.

—Action against debtors—Capacity.]—A wife, testamentary executrix and universal legatee of her husband, can sue, in both these capacities joined, the debtors of the succession, and need not allege that she has accepted the succession. *Kehoe* v. *Paradis*, 2 Que. P.R. 59.

—Disposal of rights—Evidence of heirship—Dower.]—See HEIRS.

— Deceased debtor — Action against minor children—Acceptance of succession.]

See INFANT, VI.

—Action against heir—Averments—Inscription en droit.]—See PLEADING, XI.

SUCCESSION DUTY.

See REVENUE.

SUNDAY.

—Sunday observance—Ordinary calling—Foreman of railway elevator.]—The defendant was convicted of following his ordinary calling of foreman of the Grand Trunk Railway Company elevator in superintending the unloading of grain from a vessel into the elevator on Sunday:—Held, that R.S.O. c. 246 does not apply to that railway, and as it did not apply to the employer it did not apply to the employee. Conviction quashed, with costs against the prosecutor. *The Queen* v. *Reid*, 30 Ont. R. 732.

SUPERIOR COURT.

—Jurisdiction—Municipality—Action by special superindent—Arts. 401, 807, 1042 M.C.]

See ACTION, X.

SURETY.

—Municipal election — Contestation — Qualification of surety—Affidavit of justification.]

See MUNICIPAL CORPORATIONS, XVII.
And see PRINCIPAL AND SURETY.

SURSIS.

See PRACTICE AND PROCEDURE, LVI.

SURVEYS.

—Bornage—Concession line—Evidence.]

See BORNAGE.

TELEGRAPH COMPANY.

— Transmission of messages — Proper care — Negligence of operator—Agency—Printed conditions—Limiting liability.]

See NEGLIGENCE, XVII.

TELEPHONE COMPANY.

—Telephone in private house—Taxation—58 V., c. 57 (P.Q.).]

See ASSESSMENT AND TAXES, VI.

—Liability for damage arising from poles on highway.]

See MUNICIPAL CORPORATIONS, XI.

TENANT.

See LANDLORD AND TENANT.

TENDER.

See PRACTICE AND PROCEDURE, LVIII.

THEATRE.

—Ticket holder—Reserved seats—Right of admission—Negro—Breach of contract.]

See CONTRACT, XVII.

TICKETS.

—Place of public amusement — Negro ticket holder—Reserved seats—Breach of contract.]

See CONTRACT, XVII.

TIERS-SAISI.

—Landlord and tenant—Payment of rent by lodging the landlord—Rights of landlord's creditors—Seizure of rent.]

See DEBTOR AND CREDITOR, VII.

TRADE.

—Universal custom.]—An alleged custom of trade denied by most of the manufacturers engaged in similar business cannot be considered uniform or universal, and is not binding; but in the present case the custom of trade by which orders were to be filled according to the dates of reception was sufficiently proved and binding. *Marsh* v. *Leggat*, 8 Que. Q.B. 221, affirmed by Supreme Court June 5th, 1899.

—Business taxes—Trading licenses — Arts. 582 and 583a M.C.]—The plaintiff kept one or more shops, and also boxes and wheelbarrows from which he sold personally or by means of his employees objects of piety in the municipality of Ste. Anne. These boxes or wheelbarrows were stationed on a certain platform which the corporation had constructed at its own cost expressly for that purpose.—He took licenses for his trade,

both for himself personally and for each such employee and paid for all these licenses. He contended by this action that the license fees exacted from him were beyond those permitted by law, and that payment of only one license fee should have been required from him:—Held, that the power of municipal corporations to require the taking of licenses by persons desiring to exercise certain callings is given with a view to the better maintenance of order therein. This object would be in a great measure defeated if under a license to one person an unlimited number of employees could act. Therefore, under the circumstances of this case, the defendants were justified in exacting that a license should be taken by each party intending to sell, specially so when each seller occupied a separate place on the platform erected by the defendants. *Richard* v. *Corporation of Ste. Anne de Beaupré*, 14 Que. S.C. 432.

—Affreightment—Bill of lading—Delivery—Custom of trade.]—Where by an express condition of the bill of lading, it is provided that the responsibility of the shipowners shall cease so soon as the goods are discharged from the ship's deck to the wharf, the consignee cannot invoke in support of a claim for shortage, an alleged custom of the fruit importation trade at the port of arrival, to the effect that consignees usually take delivery only after sale of the goods by auction on the wharf, by giving delivery orders to the purchasers at the sale; and the fact that the shipowner permitted such sale on the wharf and assisted the consignee in the delivery of the goods to the purchasers, is not a waiver of the condition of the bill of lading. *Hart* v. *Parsons*, 15 Que. S.C. 515 (reversing 12 S.C. 540; C. A. Dig., (1898) 432, *sub nom*, *Hart* v. *Pearson*).

—Restraint—Electric Co.—Exclusive franchise—B.N.A. Act, s. 91, s.s. 2—58 V., c. 69, s. 24 (P.Q.).]

See CONSTITUTIONAL LAW, IV (*b*).

—Sale of business—Covenant by vendor—Rival firm—Injunction—Arts. 957 et seq. C.C.P.]

See CONTRACT, I.

—License—Warehousemen—Agents—57 V., c. 11 (P.Q.).]

See MUNICIPAL CORPORATIONS, XIII.

TRADE-MARK.

—Action to expunge a trade-mark—Plaintiffs out of jurisdiction—Costs—Refusal to order security for—Particulars.]—On an application by the plaintiffs to expunge defendants' trade-mark from the register, the defendants, resident out of the jurisdiction, applied for and obtained an order for security for costs against the plaintiffs, also resident out of the jurisdiction; plaintiffs thereupon applied for a similar order upon the ground that the matter was within the discretion of the Court.—Held, that security should not be ordered against the defendants. *Wright, Crossley & Co.* v. *Royal Baking Powder Co.*, 6 Can. Ex. C.R. 143.

TRADE NAME.

—Injunction—Colourable imitation—False representation.]—The appellant company, being the transferee of the assets and goodwill of the dissolved Sabiston Lithographic and Publishing Company, sued to restrain the respondent from carrying on business under the name of the Sabiston Lithographing and Publishing Company, or any other name so framed as to lead to the belief that his business was in succession to that of the dissolved company.—Held, that the respondent had no right so to represent, but that there was no evidence that he had done so, and that the appellants were not entitled to an injunction against the mere use of the name. *Montreal Lithographing Co.* v. *Sabiston* [1899], A.C. 610; affirming 6 Que. Q.B. 510; C.A. Dig. (1898) 80.

—Loan companies—Similarity of name—Deception of public—Injunction.]—See COMPANY, II.

TRESPASS TO LAND.

—Conventional line—Evidence—Case proper to be withdrawn from jury—New trial—Power of County Court Judge to ignore findings.]—In an action of trespass, defendant relied, among other defences, upon a conventional line alleged to have been agreed upon between defendant and M., the original lessee. The jury found in favour of the line claimed, but none of the elements necessary to enable the parties to make a conventional line existed, and there was no evidence to support such a line:—Held, that the case should have been withdrawn from the jury. *McDonald* v. *Mahoney*, 31 N.S.R. 523.

—Plea of justification under tenant in dower—Fire-wood and fencing—Damages—Injury to inheritance.]—In an action brought by plaintiff, as owner, in fee in possession, of a certain tract of land, against defendant, for breaking and entering and cutting wood, etc., defendant justified under C. R., the tenant in dower, to whom the land where the cutting took place had been assigned. The learned trial Judge having found in defendant's favour as to the boundaries of the land assigned:—Held, that his findings on this point should not be disturbed; Held, also, that under the provisions of R.S. (5th series), c. 94, s. 66, where there is in the same parcel both cultivated land and woodland assigned, the timber cut for fencing must be confined in the use thereof to the same par-

cel of land, but fire-wood may be taken for the widow's use even though she may not reside on the identical parcel or tract from which it is taken; Held, also, that plaintiff could not recover on a claim for carrying a small quantity of wood in the winter time, by a wood road, across a portion of plaintiff's land not included in the area assigned for dower, the land being, at the time, in possession of a tenant at will; Held, also, that if damages were recoverable in such case, they should be assessed at the smallest possible amount. Per Henry, J.:—Held, that it was not sufficient for plaintiff to establish that the acts complained of were such as could not be justified by the tenant; he must also shew an injury to the inheritance; also, that even if plaintiff were entitled to recover on his claim for trespass to land outside the dower, the Court would not set the judgment aside for that purpose, the matter being subordinate to the real matter in dispute. *Wilkie* v. *Richards*, 32 N.S.R. 295.

—Death of plaintiff—Survival of action—Judgment.]—On the 30th January, 1897, M. commenced an action of trespass against defendant, claiming damages for various acts of trespass, including erecting and maintaining fences. On the 20th July, 1897, M. died, having appointed G. his sole executrix. On the 8th March, 1898, counsel for defendant applied under O. 17, R. 8, and obtained an order permitting him to sign judgment for his costs of defence, when taxed, and issue execution, in the event of the failure of G. to appear within twenty days after the service of the order, and obtain leave to continue and proceed with the action. G. failed to appear, having been advised that the cause of action was not one that survived, and that it was not necessary for her to do so, but, ultimately, an application was made to the learned Judge, on behalf of G., to rescind and set aside the order, and for a stay of proceedings. The learned Judge refused to set aside the order on the grounds that the application was not made to alter the order because of slip or oversight, and that the order had been drawn up and represented the real opinion of the Court, and that, in such case, he had no jurisdiction to make the alteration; but he gave leave to appeal from the order, notwithstanding that the time for appealing had elapsed, and he directed a stay of proceedings:—Held, that the cause of action being one that, under the provisions of R.S. c. 113, s. 1, survived—in part, at least—to the executrix, defendant's counsel was entitled, under O. 17, R. 8, to the order requiring her to appear and obtain leave to carry on the proceedings, and that the order was rightly made. Held, also, that the learned Judge was right in refusing to rescind and set aside the order. *Miller* v. *Corkum*, 32 N.S.R. 358.

—Forcible entry—Criminal Code, s. 89.]—A trespasser upon lands in the occupation of another, although he enters in a manner likely to cause a breach of the peace and with force sufficient to overcome resistance, cannot be convicted of a forcible entry under s. 89 of The Criminal Code, where the entry was made for the sole purpose of seizing and taking away goods, and there was no intent to take possession of the land or to oust the person in possession, or to interfere with his actual occupation of it. S. 89 of the Code was not intended to make any change in the former law as to forcible entry or to create any new offence. *The Queen* v. *Pike*, 12 Man. R. 314, 2 Can. Cr. Cas. 314.

—Trespass to Crown lands.]

See CROWN LANDS.

—Municipal corporation—Possession of private land—Recourse of owner.]

See MUNICIPAL CORPORATIONS, IX.

TRUSTS AND TRUSTEES.

I. APPOINTMENT.

—Discretion of judge—Appointment of relative—Costs.] — The appointment of a fit and proper person to be a new trustee is a matter largely within the discretion of the Judge who hears and decides upon the petition, and if, after a full consideration of the circumstances, it does not appear that the discretion has been wrongly exercised, or that the rules governing the making of such appointments have been infringed, the appointment made will not be disturbed. Per Meagher, J.:—Held, that while, under the circumstances shewn, the Court should not set aside the appointment, the appointment of relatives should be avoided whenever another competent party can be had. *Re Cronan*, 31 N.S.R. 477.

II. BREACH OF TRUST.

— Insolvency — Purchase by inspector.] — An inspector of an insolvent estate is a person having duties of a fiduciary nature to perform in respect thereto and he cannot be allowed to become a purchaser, on his own account, of any of the estate of the insolvent. *Davis* v. *Kent*, 17 S.C.R. 235, followed. *Gastonguay* v. *Savoie*, 29 S.C.R. 613.

III. CREATION OF TRUSTS.

—Trust deed—Construction of provisions—Estate conveyed—Words "upon such attaining."]—T. C. K. conveyed a number of bonds to trustees in trust to pay the interest and dividends to himself for life, and, after his death, to his wife, E. K., until the youngest of his two daughters, B. K. and T. K., should attain the age of twenty-one years, and, upon such attaining, to hold the said bonds to the sole and absolute use of the said B. K. and T. K., share and share alike, and of the survivor of them in case of the death of either of them, provided,

in the event of the said B. K. and T. K. dying, leaving children, then, and in such case, in trust to transfer and assign such bonds unto such children or child, etc. T. C. K. died in February, 1890; his youngest daughter, T. K., died in February, 1882; his wife, E. K., died in September, 1882. The surviving daughter, B. K. attained the age of twenty-one years in May, 1896, and subsequently married:—Held, affirming the judgment appealed from, that B. K., having attained the age of twenty-one years and married, was entitled to the whole fund absolutely, and not only to a life estate with a gift over to her children, if any. Held, that the words, "upon such attainment," were properly applied to the event which had happened, namely, the death of the younger daughter under twenty-one, and the attaining of that age by the elder. *Jones* v. *Smythe*, 32 N.S.R. 66.

IV. Defaulting Trustees.

—Embezzlement of trust funds—Suspension of civil remedy—Stifling prosecution—Partnership.]—The Imperial Act, 20 & 21 V., 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 repayment of any trust property misappropriated." Held, 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. *Major* v. *McCraney*, 29 S.C.R. 182, 2 Can. Cr. Cas. 547, affirming 5 B.C.R. 571.

V. Insolvent Trustee.

—Removal—Appointment of receiver—Dismissal of bill.]—An insolvent executor and trustee disputed a creditor's claim, and the creditor filed a bill for the appointment of a receiver, and the payment of his debt. The appointment of a receiver was opposed by all other parties interested in the estate. Pending the suit the creditor brought an action at law upon his debt and recovered much less than the amount originally demanded of the executor. The debt was then paid:—Held, that the bill should be dismissed with costs. *Mills* v. *Pallin*, 1 N.B. Eq. 601.

VI. Liability of Trustee.

—Investment—Fraud of co-trustee—Cheque—Forging indorsement.]—L., a trustee under a will, relying upon the report of his co-trustee, a solicitor, in investing moneys of the estate, that he had made a loan on satisfactory security, joined him in signing a cheque on the estate bank account payable to the order of the alleged borrower. The solicitor trustee indorsed the cheque by forging the payee's name, obtained the money and absconded:—Held, that L. was not chargeable with the loss. *Re McLatchie*, 30 Ont. R. 179.

—Liability of executor to cestuis que trust—Notice for claims—Fund—Statute of Limitations.]

See Executors and Administrators, VII.

VII. Particular Trusts.

—Will—Devise to wife—Condition—Breach—Reversion to trustees.]—See Will, II.

VIII. Remuneration of Trustees.

—Solicitor—Trustee—Costs in Surrogate Court.]

See Solicitor.

IX. Trust Estate and Funds.

—Trustees and executors—Art. 981o C.C.—Responsibility of trustee for investment of moneys.]—At the time of defendant's appointment as executor and trustee he received certain shares in a bank, which shares had been purchased by the testatrix, and reserved by the executor and trustee who preceded defendant, for the purpose of an investment to secure the plaintiff interest which she was entitled to receive under the will. Art. 981(*o*) C.C., under which trustees are bound to invest moneys held by them as administrators in certain securities, amongst which bank stock is not included, was in force at the time of defendant's appointment:—Held, that as defendant when appointed, did not receive or hold any moneys for the benefit of the plaintiff, but merely shares of stock standing in the name of the executors, he was not bound under the circumstances to change the investment, and could not be held responsible for the loss occasioned by the insolvency of the bank. *Hill* v. *Campbell*, 15 Que. S.C. 125.

—Petitions under R.S.C. c. 119, s. 50—Payment of succession duties.]—On a petition under s. 50 of R.S.C. c. 119 for an order awarding certain shares in the petitioner's stock held by a deceased person in trust—the petitioner alleging that it had doubts because the succession duties had not been paid, and further, because it was not shewn for whom the trust had been created,—the non-payment of succession duties does not prevent the heirs and executors from taking possession of the deceased's estate, the prohibition being only against transfers by them (55-56 V., c. 17: R.S.Q. Art. 1191(*d*,) par. 5), and further, the corporation was not bound to see to the execution of trusts (R.S.C. c. 119, s. 81). Costs on the petition were, however, refused, the

Court considering that no doubt existed sufficient to justify the proceeding. *In re Denoon*, 15 Que. S.C. 567.

—Trustee outside jurisdiction—Vesting order.]—When one trustee is resident out of the jurisdiction the Court will not vest the estate in the trustees within the jurisdiction on the ground that it will not reduce their number. A petition to vest the trust estate in certain trustees within the jurisdiction ought to be served on the absent trustee. *Re Spinks Trusts*, 6 B.C.R. 375.

TUTOR.

—Promissory note signed by—Obligation of minor on.]—See INFANT, II.

—Tutelle—Right of mother—Hearing before prothonotary—Review—Art. 263 C.C.]

See PARENT AND CHILD.

USAGE.

—Usage of Stock Exchange.]

See COMPANY, XI.

USUFRUCT.

—Land subject to—Sheriff's sale—Right of creditor—Report of distribution—Contestation—Arts. 135, 797, 815-7 C.C.P.—Arts. 479, 480 C.C.]

See SALE OF LAND, XIII.

VACATION.

—Judge in Chambers—Folle enchère.]—A Judge in Chambers cannot, during the long vacation, grant a petition for *folle enchère*. *Parent* v. *Bruneau*, 8 Que. Q.B. 377. (But he can now by 62 V., c. 52 (Que.).]

—Amendment—Arts. 513, 523 C.C.P.]—An amendment to a writ and declaration may be made in vacation. *Smith* v. *Nevell*, 2 Que. P.R. 236.

—Pending trial—Vacation—B.C. Rule 736 (d).]

See PRACTICE AND PROCEDURE, LX.

WAGES.

—Seizure—Prejudice to plaintiff—Arts. 599, 678, 680, 697 C.C.P.—Art. 1147 C.C.]

See SAISIE-ARRÊT.

—Attachment—Seaman—Second in command—Seizure—Assignment.]—See SHIPPING, XIII.

WAIVER.

—Fire insurance—Conditions of policy.]

See INSURANCE, II.

—Benefit association—Payment of assessments—Forfeiture—Waiver—Pleading.]

See BENEFIT SOCIETY.

—Secondary evidence—Rule of law—Lack of objection.]—See EVIDENCE, IX.

—Ditches and water-courses—Engineer's award—Defective procedure in making same.]

See MUNICIPAL CORPORATIONS, VII.

—Bill of lading—Condition—Delivery of freight—Custom of trade.]—See SHIPPING, I.

WAREHOUSEMEN.

—Agents—License—57 V., c. 11 (P.Q.).]

See MUNICIPAL CORPORATIONS, XIII.

WARRANTY.

See ACTION, XXVII.

WATERS AND WATER-COURSES.

—Drainage—Cultivation of land.]—While the owner of land has an undoubted right to drain it in the ordinary course of husbandry, he must take care that any water collected by his drains is carried to a sufficient outlet, and if the water is drained into a pond which is not large enough to hold the additional volume of water thus brought into it, he is liable to damages to a person whose land is flooded by water overflowing from such pond. *Young* v. *Tucker*, 26 Ont. App. 162.

—Prescription—Riparian rights—Artificial channel.]—About the end of the last century an artificial channel or water-race was built across a lot now owned by the plaintiffs for the purpose of carrying water from a stream above the plaintiffs' land to a mill below, the water being diverted into the channel by means of a dam. The channel and the banks on either side of it never formed part of the plaintiffs' land, having been excepted therefrom so that their land was not contiguous to the water. The defendants diverted the water and the plaintiffs were thereby deprived of the use of the same for watering their cattle:—Held, that the plaintiffs were not riparian proprietors and could not claim any right by prescription to the use of the water. *Buchanan* v. *Ingersoll Waterworks Co.*, 30 Ont. R. 456.

—B.C. Crown Lands Act, ss. 39-52—Water—Diversion by recorded owner—Injury to adjacent proprietor—Damages—Injunction.]—The defendants as owners of recorded water privileges under ss. 39-52 of the Crown Lands Act, were entitled to and did divert in and upon their land water from a neighbouring stream, for irrigation purposes. The effect of this user of the water was to create a slide, carrying down masses of silt, etc., upon the plaintiff's railway line, which was constructed by the Dominion Government and conveyed to the plaintiffs after the defendants' rights to the pre-emption and user of the water accrued. It appeared that, without the irrigation, the defendants' lands were worthless, and that the injury was an unavoidable incident of the exercise of the defendants' statutory rights. Negligence was not alleged. Held, by Drake, J., at the trial dismissing the action (affirmed by the Full Court, McCreight, Walkem and McColl, JJ.), that there being no allegation or proof of a negligent user by the defendants of their statutory rights, it was a case of *damnum sine injuria*. *Quære*, per McColl, J., whether, if the plaintiffs had themselves constructed the part of the railway in question, the defendants would not have been entitled to compensation for injury to their lands by the plaintiffs. *Canadian Pacific Ry. Co.* v. *Parke*, 6 B.C.R. 6.

—Trespass—Right of landowner to relieve himself of flooding by backing water on to lands adjoining.]—In British Columbia the cultivation by means of irrigation, of land so situated as not to be otherwise capable of cultivation, is a natural and reasonable user of such land; and an injury to the defendant's land caused by such irrigation of his own land by an adjoining proprietor, could not lawfully be averted by any erection upon the defendant's own land diverting it upon the property of another. Upon appeal to the Full Court (Walkem, Drake and Irving, JJ.):—Per Drake, J.: The owner of land may protect himself from injury arising from an accumulation of water on his neighbour's land, and which, under ordinary circumstances, would find its way on to his own land, but in thus protecting himself he must not injure an innocent third party. Where an injury is caused to the land of another by artificial means, such as using water on one's own land for irrigation, the party injured can abate the nuisance in a manner least injurious to the persons creating it. Per Irving, J.: That the water was diverted upon the plaintiff's land by means of an artificial erection on the land of the defendant, which was not a natural user of his land, but was a violation of the rule of law expressed in the maxim *sic utere tuo*, etc. Walkem, J., concurred. *Canadian Pacific Ry. Co.* v. *McBryan*, 6 B.C.R. 136.

See MUNICIPAL CORPORATIONS, VII.

—Railway—Culvert—Insufficiency—Liability for damage.]

See RAILWAYS AND RAILWAY COMPANIES, IV.

WATERS, CANADIAN.

—Foreshore—Seigniorial title in Quebec.]

See FORESHORE.

WATERWORKS COMPANY.

—Gas and Waterworks Company's Act, R.S.O. c. 199—Arbitration.]

See ARBITRATION AND AWARD, VI.

WAY.

—Easement—Prescription—Landlord and tenant—Acknowledgment by tenant.]—After a right of way had been enjoyed for more than the period necessary to obtain title thereto by prescription the tenant of the dominant tenement, without the knowledge of the owner, gave to the tenant of the servient tenement two pairs of shoes as consideration for the exercise of the right:—Held, that even if an act of this kind could in any event affect the right that had been acquired the owner of the dominant tenement was not bound by what the tenant did without his authority. *Ker* v. *Little*, 25 Ont. App. 387.

WIDOW.

—Second marriage—Rights of second husband—Edit des secondes noces—Repeal—41 Geo. 3, c. 4—Art. 831 C.C.]—See STATUTE, IV.

WILLS.

I. APPORTIONMENT.

—Life insurance—Benefit of wife and children—Apportionment by will.]

See BENEFIT SOCIETY.
" INSURANCE, III.

II. CONSTRUCTION.

—Survivorship—Period of distribution—Vesting of shares.]—A testator by his will gave his residuary estate to his executors upon trust to make provision for the support and maintenance of his family and for their education

until his youngest surviving child should attain twenty-one years of age, when it was to be divided by the executors, by their setting apart one-third thereof for his widow, during her widowhood or until she remarried, and the remaining two-thirds to his surviving children in the proportion of four parts to the sons and three parts to the daughters; and after the death or marriage of his widow, the said one-third was to be divided between his surviving children in the above proportions. The widow survived the testator, but died before the youngest surviving child attained the age of twenty-one years. — Held, that the words of survivorship referred to the period of distribution, namely, when the youngest surviving child attained twenty-one years of age, and, therefore, only the children then living were entitled to share in the residue, and this applied as well to the shares to be taken by the children as to the share to be set apart for the widow. *Re Soules*, 30 Ont. R. 140.

—**Repugnant clauses.**]—A testator by the third clause of his will devised a lot of land to a son in fee simple, and by the fourth clause it was provided (as happened) that if his said son should leave no lawful heir or children the plaintiff, another son, should have the lot in fee simple. By the fifth clause he gave his wife the use of half the lot during her life, and after her death such half of the lot was to belong to his son firstly above mentioned, in fee simple:—Held, that the fourth and fifth clauses were irreconcilable; nor could they be transposed so as to reduce the fee simple in the third clause to an estate for life should the devisee therein die without issue, with remainder to the plaintiff: that the devise in the third clause was by the fourth clause cut down to an estate tail with a remainder in fee to the plaintiff, and that the fifth clause gave a life estate in the half of the lot to the testator's widow with a remainder in fee to the son firstly mentioned. *McMillan* v. *McMillan*, 30 Ont. R. 627.

—**Payment of debts — Postponement of possession — Arts. 1082, 2037, 2038, 2150 C.C.**] — A clause in a will concluding as follows: "If the hypothecary and other debts of my succession and that of my deceased wife are not paid at my death then my residuary legatees, as well as my special legatees, cannot divide nor enjoy the legacies which I give nor take possession of them until all the said debts have been paid" merely suspends the enjoyment and possession, but does not affect the right of property. *Hamel* v. *Proteau*, 15 Que. S.C. 619.

—**Obvious intention of testator.**]—T. C. K., by his last will, bequeathed certain property to trustees, in trust for his wife, E. K., and his two daughters, T. K. and B. K. The will contained the following provision:—"In case the said T. K. shall depart this life in the lifetime of the said B. K., after the decease of the said E. K., without leaving any issue her surviving, then the said trustee shall pay the whole of the interest derived from such trust funds to the said D. K.——" The clause immediately preceding made similar provision in case of the death of B. K. in the lifetime of E. K. By other provisions of the will, the wife, E. K., was given a life interest in one-half of the whole trust fund, and was entitled to receive the income arising from the remainder for the support and education of the daughters during their minority. It being clear that it was the intention of the testator to provide for what was to be done with the income arising from the trust fund after the death of T. K. and E. K., without reference to which of them should die first:—Held, that the words should be so construed as to give the same effect to them as if they applied expressly to the event of the death of T. K. occurring before that of E. K. Held, that the words "after the decease of the said E. K." did not constitute a contingency, but merely expressed the position that the death of E. K. was subject to the interest of her mother, E. K., and that the whole income could only be paid to the surviving daughter, after the happening of the latter event. *Jones* v. *Smythe*, 32 N.S.R. 95.

—**Absolute gift—Condition for divesting—Repugnancy.**]—A testator by his will gave a lot of land, with house thereon and personal property, to his wife absolutely, to enable her to maintain a home for herself and the testator's sons until they should attain the age of twenty-one years. The residue of his estate he gave to trustees in trust for his sons. The will then provided that the devise and bequest to the wife should be in lieu of dower, and that if she married again the property devised to her should vest in the testator's trustees for the benefit of his sons:—Held, that the wife took an absolute interest free from any trust in favour of the sons, but subject to the gift being divested in the event of her marriage, and that such condition was not void as being repugnant to the gift. S. 7 of Act 58 V., c. 25, does not apply to a will made before the passing of the Act, varying a policy of life insurance. *Leonard* v. *Leonard*, 1 N.B. Eq. 576.

—**Construction—Costs when all parties not before the Court—Appeal as to costs.**]—See COSTS, II.

—**Income of estate—Devise to trustees—Maintenance of children.**]—See INFANT, V.

III. DEVISES AND LEGACIES.

—**Construction of statute—14 and 15 V., c. 6 (Ont.)—Devise to heirs.**]—The Ontario Act 14 and 15 V., c. 6, abolishing the law of primogeniture in the province, placed no legislative interpretation on the word "heirs." Therefore, where a will made after it was in force devised property on certain contingencies to "the heirs" of a person named,

such heirs were all the brothers and sisters of said person and not his eldest brother only. *Wolff* v. *Sparks*, 29 S.C.R. 585, affirming 25 Ont. App. 326.

—Executors and administrators—Power to mortgage—Payment of debts—Ont. Trustee Act—Devolution of Estates Act.]—The testatrix, after a direction to him to pay her debts, devised land to her executor and trustee, and his executors and administrators, upon trust to retain for his own use for life, and directed that after his decease his executors or administrators should sell the land and divide the proceeds among her children:—Held, that this was a devise of the farm out and out as to the legal estate—the words "and his executors and administrators" being equivalent to "heirs and assigns;" the executor had the right by virtue of s. 16 of the Trustee Act, R.S.O. c. 129, to mortgage the entire fee for debts; and the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by s. 19. *In re Bailey*, 12 Ch. D. at p. 268, and *In re Tanqueray-Willaume and Landau*, 20 Ch. D. at p. 476, followed. The Devolution of Estates Act, R.S.O. c. 127, does not apply to a case where the executor derives his title to the land from, and acts under, the will and the provisions of the Trustee Act. *Mercer* v. *Neff*, 29 Ont. R. 680.

Restraint on alienation—Repugnancy—Invalidity—Contingent executory interest—Remoteness—Perpetuities.]—In the early part of a will, lands were devised to the vendor, a son of the testator, in fee, and other lands were devised to other children, but in the latter part of the will there was this clause: "It is fully understood that my children have no power to make sale or mortgage any of the lands mentioned, but to go to their heirs and successors . . Should any of my children die childless leaving husband or wife, said husband or wife to have a third during the term of their natural life:"—Held, that the first part of this clause amounted to a total restriction upon alienation, and was repugnant to the nature of the estate given by the devise, and was therefore void; Held, that the words "die childless" in the last part of the clause should be taken to mean "die not having children or a child living at the time of such death," and this part of the clause created a contingent executory interest or estate of freehold, which from its legal nature, would upon the contingency happening in its favour, spring up into existence; Held, also, that although many children of the vendor were living, none of whom was born till many years after the testator's death, and all of whom must die before the executory interest could take effect, yet the gift was not too remote, and did not infringe upon the rule against perpetuities. *Re Thomas and Shannon*, 30 Ont. R. 49.

—Restraint on alienation—Invalidity.]—Devise of real estate to a son with a condition as follows: "But I direct that before my said son . . . shall sell, mortgage, trade or dispose of, or encumber the said property or any part thereof, or any farm produce or timber, that he shall first obtain the consent of my sister . . . ":—Held, that the restriction being against all kinds of alienation, and in that regard absolute and unlimited, as the required consent was a condition precedent to any kind of alienation and unlimited as to time, the restraint was void. *McRae* v. *McRae*, 30 Ont. R. 54.

— "Cousins"—Indefinite dispostion—Trust—Power of appointment—General power.]—The testator died a bachelor, leaving no relations nearer than first cousins. By his will he gave certain specific legacies, one of which was, by clause 7, "to each of my cousins" the sum of $1, and proceeded: "9. I desire that my executors . . . shall have full power to make such and any disposition of the residue . . . of my . . . estate as they, in their judgment, may deem best, and to make due enquiry into the financial and social standing of my relations in Ireland, and, after an investigation and a proper knowledge is obtained, to make such grants and disposition of a portion of my estate and property as they, in their judgment, consider best, to such relations. 10. I also give my said executors power and desire them to dispose of any balance of my estate . . . to the best of their judgment, where they may consider it will do the most good and deserving. 12. I also give my executors power to hold property in trust for any of my friends whom they may think proper." By clause 1 he appointed certain persons "executors and trustees" of his will:—Held, that the word "cousins" in clause 7 must be taken to mean first cousins only. That no trust was created in favour of the relations in Ireland; the power given by clauses 9 and 10 was a general power over the residue, without the creation of a trust; it was an absolute power of appointment, which the executors might exercise in favour of themselves or any other person or persons; and the heirs or next of kin could not successfully, as upon an intestacy, make any claim upon the residue, unless in case of default of appointment. That the expressions used in clauses 1 and 12 did not shew that the residue was held by the executors in trust or that there was any trust connected with the power given. *Higginson* v. *Kerr*, 30 Ont. R. 62.

—Gift—Mistake in name of donee—Validity—Declaration—Originating notice.]—A testator bequeathed a sum of money to his "sister Anastasia Cummings." He had only two sisters, Catharine Kelly, to whom he bequeathed a like sum, by her proper name, and Maria Cummins:—Held, that the gift took effect in favour of Maria Cummins. Held, also, that a declaration to that effect could properly be made upon an originating notice under Rule 938. *In re Sherlock*, 18

Ont. Pr. 6, followed. *Re Whitty*, 30 Ont. R. 300.

—**Restraint on alienation—Validity—Attempt to alien—Forfeiture—Heirs-at-law.**]—A testator devised land to his three sons, in equal shares, in fee simple, adding, "without power to them, or any of them, to charge or alien the same or any part thereof except by . . will":—Held, following *re Winstanley*, 6 Ont. R. 315, a valid restraint on alienation. The three sons were the sole heirs at law of the testator. After becoming entitled to the possession of the land under the devise, they joined in a mortgage of it in fee to a stranger. One of the three then contracted to sell his share to the other two: Held, that each of the devisees, by making the mortgage, had forfeited his estate under the will, and each had become entitled as heir at law to an undivided third of the whole, and therefore the vendor could make a good title in fee simple to his undivided share to his brothers, the purchasers. *Re Bell*, 30 Ont. R. 318.

—**Action for legacy—Parties.**]—A legatee under a will cannot maintain an action against the executor for payment of his legacy without making the heirs of the deceased and other legatees parties. *Stewart* v. *Stewart*, 2 Que. P.R. 121.

—**Devise à titre d'aliments—Seizure—Art. 599 C.C.P.**]—See ALIMENT.

IV. POWER OF APPOINTMENT.

—**Disposition by will—Execution of power—Invalidity of the bequest.**]—A wife having a power of appointment under her husband's will in the words "my said wife shall have full power to dispose of by will or otherwise," by her will devised all her real and personal estate to executors "in trust to convert the same into cash" and pay legacies, and as to the rest and residue to convert into cash and "divide the proceeds among friends, relatives and labourers in the Lord's work according to the judgment of my executors":—Held, that the disposition made clearly indicated an intention to take the property dealt with out of the instrument containing the power for all purposes, and not only for the limited purpose of giving effect to the particular disposition expressed; but that the residuary bequest was void as too indefinite, and that the executors took the property in trust for the next of kin of the appointor and not beneficially. *Re Wilson*, 30 Ont. R. 553.

IV. POWER OF APPOINTMENT.

—**Intention to exercise power—Direction to pay debts—C.S.N.B., c. 77, s. 22.**]—A testatrix, having a general power of appointment under the will of her father over real and personal estate, by her will directed that her debts and funeral expenses should be paid out of her estate. After making certain bequests the testatrix proceeded as follows: "The real estate of which I am possessed, and the personal estate to which I am entitled, came to me under the will of my late father, and it is my will that after the payments above provided for that the residue of my estate, such as came to me under my said father's will, and all other I may be entitled to, both real and personal and mixed, shall be divided between my three children." The testatrix had no estate of her own:—Held, that the will operated as an exercise of the power, the direction to pay the testatrix's debts out of her estate being but one circumstance to be considered in determining what her intention was. *Hutchinson* v. *Baird*, 1 N.B. Eq. 624.

See EXECUTORS AND ADMINISTRATORS.

WITNESS.

—**Examination de bene esse—When permitted—B.C. Rule 749—Abridgment of time.**]—The serious illness of a necessary witness is ground for granting an order for his examination *de bene esse*.—When justice so requires, the Court will make an order abridging the month's notice required by Rule 749 from the party desiring to proceed in the action in which there has been no proceeding for one year before the last proceeding. *Bank of Montreal* v. *Horne*, 6 B.C.R. 68.

—**Alteration in promissory note—Expert witness.**]

See BILLS OF EXCHANGE AND PROMISSORY NOTES, IV.

—**Evidence—Admissibility—Death of witness before cross-examination.**]—See EVIDENCE, I.

—**Husband and wife—Séparation de biens—Art. 314 C.C.P.**]

See HUSBAND AND WIFE, XII.

WORDS AND TERMS.

"**Arrears of rent due.**"]—See *Lazier* v. *Henderson*, 29 Ont. R. 673, ante 45.

"**Co-insurance.**"]—See *Eckhart* v. *Lancashire Insurance Co.*, 29 Ont. R. 695, ante 207.

"**Conveniently.**"]—See *Hastings* v. *Summerfeldt*, 30 Ont. R. 577, ante 316.

"**Costs of commitment.**"]—See *The Queen* v. *Doherty*, 32 N.S.R. 235, ante 67.

"**Defendeur.**"]—See *Harvey* v. *Mowat*, 2 Que. P.R. 228, ante 115.

"**Droits de Gage.**"]—See *Barker* v. *Central Vermont Ry. Co.*, 14 Que. S.C. 467, ante 440.

"**Committed to jail for trial.**"]—See *The Queen* v. *Smith*, 31 N.S.R., 411, ante 132.

"**Executors and administrators.**"]—See *Mercer* v. *Neff*, 29 Ont. R. 680, ante 179.

"**Forthwith pay.**"] — See *The Queen* v. *Crowell*, 2 Can, C.C. 34, ante 138.

"**Hack horse.**"]—See *Robinson* v. *Provincial Exhibition Commission*, 32 N.S.R. 216, ante 189.

"**Implicating the accused.**"]—See *The Queen* v. *Vahey*, 2 Can. Cr. Cas. 258, ante 127.

"**Injures personnelles.**"] — See *Peltier* v. *Martin*, 14 Que. S.C. 223. ante 440.

"**Knowingly and Wilfully.**"]—See *Aldrich* v. *Nest Egg Company*, 6 B.C.R. 53, ante 380.

"**Language of the defence.**"]—See *The Queen* v. *Yancey*, 2 Can. Cr. Cas. 320, ante 130.

"**Landlord's Preferential Lien.**"]—See *Lazier* v. *Henderson*, 29 Ont. R. 673, ante 45.

"**Likely to be permanently injured.**"]—See *The Queen* v. *Bowman*, 31 N.S.R. 403, ante 127, 128.

"**Man and woman.**"]—See *The Queen* v. *Riopel*, 2 Can. Cr. Cas. 225, ante 137.

"**Nominativement.**"]—See *Evans* v. *Wilson*, 8 Que, Q.B. 144, ante 440.

"**Not just and reasonable.**"]—See *Eckhart* v. *Lancashire Insurance Co.*, 29 Ont. R. 695, ante 207.

"**On or after.**"]—See *Re Arthur and Corporation of the City of Nelson*, 6 B.C.R. 323, ante 275.

"**Opinion.**"]—See *Viau* v. *The Queen*, 2 Can. Cr. Cas. 540, ante 25.

"**Ordinarily resident.**"]—See *Denier* v. *Marks*, 18 Ont. Pr. 465, ante 112.

"**Owner.**"]—See *Stewart* v. *Ottawa and New York Ry. Co.*, 30 Ont. R. 599, ante 391.

"**Owner of ship.**"]—See *The Queen* v. *Harty*, 2 Can. Cr. Cas. 103, ante 127.

"**Party interested.**"]—See *Craig* v. *Maloney*, 14 Que. S.C. 255, ante 448.

"**Person in charge of a car.**"] — See *The Queen* v. *Toronto Railway Company*, 35 C.L.J. 422, ante 445.

"**Preferred beneficiaries.**"]—See *Re Cheeseborough*, 30 Ont. R. 639, ante 212.

"**Properties fronting.**"] — See *Watson* v. *Maze*, 15 Que. S.C. 268, ante 441.

"**Public officer.**"]—See *Stewart* v. *Euard*, 15 Que. S.C. 262, ante 2[illegible].

"**Registered owner.**"] — See *The Queen* v. *Harty*, 2 Can. Cr. Cas. 103, ante 127.

"**Remedy.**"]—See *Barrowman* v. *Fader*, 32 N.S.R. 284, ante 397.

"**Sale en justice.**"]—See *In re Nelson*, 15 Que. S.C. 368, ante 266.

"**Satisfactory.**"] — See *People's Loan and Deposit Co.* v. *Dale*, 18 Ont. Pr. 338, ante 147.

"**Seaman.**"]—See *Brown* v. "*The* "*Flora*," 6 Can. Ex. C.R. 131, ante 432.

"**Stealing.**"]—See *The Queen* v. *Hollingsworth*, 2 Can. Cr. Cas. 291, ante 139.

"**Substantial wrong.**"]—See *The Queen* v. *Hamilton*, 2 Can. Cr. Cas. 390, ante 126.

"**Theft.**"]—See *The Queen* v. *Hollingsworth*, 2 Can. Cr. Cas. 291, ante 139.

"**Torts personnelles.**"]—See *Peltier* v. *Martin*, 14 Que. S.C. 223, ante 440.

"**Upon such attaining.**"] — See *Jones* v. *Smythe*, 32 N.S.R. 66, ante 455.

"**Valeur actuelle.**"]—See *Cassils* v. *City of Montreal*, 14 Que. S.C. 269, ante 38.

WORKMAN.

—Privilege—Logs cut for contractor—Notice—Art. 1994c C.C.—Arts. 192, 919, 945, 956 C.C.P. —57 V., c. 47 (P.Q.).]—See LIEN, IX.

WRIT OF SUMMONS.

See PRACTICE AND PROCEDURE, LXII.